Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

Arthur M. Field, Kathryn Taillon, and

T. Bart Kelley

Petitioners,

Versus

Henry McMaster, William J. Condon, Jr.,

Jennifer Evans, Joe F. Jordan, Jr., Lansing Logan,

And Tommy Windsor

Respondents.

On Petition for Writ of Certiorari

To The U.S. Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Arthur M. Field, Esq.
310 Thornblade Blvd.,Greer, SC 29650 (864) 419-6609
Arthur-field@charter.net
Kathryn Taillon, *pro se*
310 Thornblade Blvd , Greer, SC 29650 (864) 419-2516
T Bart Kelley, *pro se*
105 Woodbridge Ct , Easley, SC 29640 (864) 275-9995

QUESTIONS PRESENTED FOR REVIEW

Plaintiffs primarily sued: State securities investigator Condon for unlawful interference with registration renewal; Condon and Chief Prosecutor Evans for wrongful interference in a civil action not involving the State when no criminal indictment issued; and both for illegal disclosure of financial information, all in violation of 42 U.S.C. § 1983 and 42 U.S.C. § 1985, *inter alia*.

1) Is a state civil investigating attorney entitled to absolute immunity when he or she: violates state or federal law; acts outside of designated authority; persecutes persons not subject to regulatory authority; and destroys a business without due process? Can such immunity lapse or terminate as a result of intervening events?

2) Is a prosecutor entitled to any immunity when acting far outside the scope of prosecutorial authority, and in clear violation of federal and state law, when no indictment has issued? What responsibility does the Attorney General have for such acts?

3) If any government employee leaks secret or confidential documents to the media or publishes them on the internet, is such person ever immune from damages? If so, when?

PARTIES

Plaintiffs below:

1) Capital Investment Funding, LLC, a South Carolina limited liability company, acting below by its Court appointed Receiver, Jerry Saad (hereafter "CIF");
2) Arthur M. Field, Ph.D., J.D., a 90% member and manager of CIF;
3) Kathryn Taillon, M.B.A., the spouse of Field;
4) T. Bart Kelley, a 1% member/employee of CIF.

Defendants below (individually and as employees of the State of South Carolina):

1) Henry McMaster, Securities Commissioner and Attorney General of South Carolina;
2) William J. Condon, Jr., A.A.G., a securities division investigating attorney;
3) Tommy Windsor, a securities investigator;
4) Lansing Logan, a State Law Enforcement agent and investigator;
5) Joe F. Jordan, Jr., a criminal investigator;
6) Jennifer Evans, Chief Prosecutor, deceased, by her personal representative.

No corporation holds more than 10% of the membership interest of CIF. (CIF may petition separately, but is referred to herein.)

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PETITION FOR WRIT OF CERTIORARI

Arthur Field, Kathryn Taillon and T. Bart Kelley petition the Court for a Writ of Certiorari to review a final judgment of the United States Court of Appeals for the Fourth Circuit entered December 7, 2010, affirming the District Court's award of summary judgment to all defendants without hearing.

OPINIONS AND ORDERS BELOW

U.S. Magistrate (unpublished): Denied Plaintiffs' Motion for Limited Discovery (App. 26) and Recommended Summary Judgment (App. 28).

U.S. District Court for South Carolina (unpublished): Granted Defendants' Motions for Summary Judgment (App. 4).

U.S. Court of Appeals for the Fourth Circuit (unpublished):

1) Dismissing Appeal *Per Curiam* (App. 1);
2) Denying Request for Rehearing *en banc* (App. 44).

STATEMENT OF JURISDICTION

Jurisdiction pursuant to 28 U.S.C. § 1254(1) appealing a decision of the U.S. Court of Appeals for the Fourth Circuit dismissing the appeal on October 20, 2010. Rehearing *en banc* denied November 30, 2010. District Court Jurisdiction: 28 U.S.C. §§ 1331; 1343 (1), (2) and (3); 28 U.S.C. §1367; U.S. Constitution Amendments Four, Five and Fourteen. Appellate Jurisdiction: 28 U.S.C. § 1291.

RELEVANT STATUTES

Federal:

42 U.S.C. § 1983
42 U.S.C. § 1985(3)
42 U.S.C. § 1986
12 U.S.C. § 3402(2)
12 U.S.C. § 3405
12 C.F.R. §353.3(a)
12 C.F.R. §353.3(g)

State of South Carolina:

S.C.C.A. §14-7-1720(E)
S.C.C.A. § 35-1-304
S.C.C.A. § 35-1-305
S.C.C.A. § 35-1-306
S.C.C.A. § 35-1-602(b)

(See Appendix for Full Text of Statutes)

STATEMENT OF THE CASE

Three related fact patterns raising vital issues of absolute and qualified immunity are presented:

1) a State investigating attorney wrongfully blocks security registration and vastly exceeds regulatory authority resulting in a taking of property without due process[1];

2) he then conspires with a State prosecutor, both act *ultra vires*, pursuing citizens in a civil matter when no indictment had issued[2]; and

3) unlawfully obtain confidential bank records and a secret bank report of persons not parties to any regulatory or criminal action and publish both causing damage to Field, Taillon and their children.[3]

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[1] Causing damage to CIF, Field, Kelley, other CIF members and its creditors (Dr Field is an attorney licensed in Connecticut and New Jersey)

[2] Causing damage primarily to Field and Taillon Taillon was not a party to any state regulatory action or involved in CIF registration in any manner

[3] The material facts herein are largely undisputed and contained in the extensively pled Verified Complaint and affidavits. The State claimed absolute immunity The Magistrate denied Plaintiffs limited discovery over their F R.C.P 56 request and affidavit (App. 26), but found the Complaint was sufficient to withstand a F R C P 12(b)(6) motion for violation of 42 U S C §§1983, 1985 and 1986 (App 41) The District Court granted summary judgment (App 4), awarding Condon and McMaster absolute prosecutorial immunity, and held insufficient Constitutional claims were 'proven' against Evans, Logan, Windsor and Jordan to overcome their affirmative defense of qualified immunity All issues were preserved and raised on appeal

A. Condon blocks registration twice, abuses the subpoena power, and engages in a cover-up. No securities action involving Field, Kelley or Taillon ever existed.

In February, 2007, CIF submitted its ninth annual complete registration application. The Chief Securities Examiner approved registration.[4] Condon, a new investigating attorney, wrongfully interfered with registration. After minimal investigation by Condon, his superior Meyers issued a *Notice of Intent to Seek a Stop Order* ("Notice").[5]

No adversarial proceeding took place.

No Stop Order ever issued.

CIF withdrew its initial application, making the Notice moot. Nevertheless, the Notice remains published on the Security Commissioner's website, causing considerable damage.

CIF filed a second registration application in May, 2007. Condon unilaterally returned the entire

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[4] South Carolina is a 'disclosure' state, not a 'merit' state Registration is mandated and ministerial if items delineated in S C C A. § 35-1-304 are submitted, absent issuance of a Final Stop Order. No fraud was ever alleged or proven against CIF.

[5] Field and Kelley are not named in the Notice Taillon was not a CIF member and the Notice was irrelevant as to her Condon was the 'complaining witness'. *He did not sign the Notice, nor initiate administrative proceedings* The Securities Division is civil Stop Orders may issue only after notice, hearing and appeal S C C A. § 35-1-306. South Carolina law doesn't create a "Notice of Intent to Issue a Stop Order" Registration wasn't denied and no securities action ever existed against CIF, Field, Taillon or Kelley

application package without any review in violation of S.C.C.A. §§ 35-1-304 to 306. Thereafter, Condon repeatedly, falsely informed the public CIF was 'denied registration' because of its 'wrongdoing'.

CIF's business and value were destroyed and CIF closed in January, 2008. Field's and Kelley's membership interests in CIF were taken without due process as a direct result. In February, 2008, the Securities Division entered into an agreement with CIF closing all regulatory matters.

In March, 2008, CIF and Field were named as defendants in a South Carolina civil action (*Tomz v. Capital Investment Funding, LLC and Field).* The State was not a party thereto.[6]

In May, 2008, Condon wrongfully issued administrative subpoenas to CIF and Field, even though no action was pending or contemplated and the closure agreement was in place. This action violated S.C.C.A. § 35-1-602.[7]

To cover up his repeated wrongful denial of registration and his abuse of the subpoena power, Condon referred undisclosed 'evidence' to the Criminal Division involving CIF and Field for investigation in September, 2008.

McMaster held a news conference announcing initiation of criminal investigation against Field and Taillon, which never resulted in an indictment, but

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[6] Taillon was not a party to the *Tomz* action CIF and Field were the only defendants.

[7] S.C.C.A. § 35-1-602(b) strictly limits issuance of a subpoena to the context of an existing or contemplated regulatory action. None existed or was pursued thereafter No response to the subpoenas was ever made and Condon ultimately withdrew them, but *they remain published on the internet.*

caused them severe distress, reputation injury, economic damage and loss of employment.[8]

B. Prosecutor Evans and Condon improperly interfere in a civil action, illegally obtain secret banking records and publish them--causing direct injury and violating federal and state law.

A State Grand Jury was subsequently convened by Prosecutor Evans, but ***no indictment ever issued.***[9]

In May, 2009, all parties to the *Tomz* civil action, mediated a settlement. Presiding civil Judge Few scheduled approval thereof for July. On June 8, 2009, Condon improperly interfered with the settlement and engaged in *ex parte* contacts with Judge Few, long after all state regulatory involvement with CIF had ceased.

On the night of June 15, 2009, Prosecutor Evans called civil Judge Few at home *ex parte*. She informed the Judge she received a secret Suspicious Activity Report ("SAR"), alleging Taillon had withdrawn $10,000.[10] Evans emailed the judge *ex*

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[8] None of the actions after May, 2007, were considered by the District Court in its decision (App. 4) None of Taillon's independent claims were considered at all.

[9] All actions of Evans and Condon were *ultra vires*. No indictment ever issued. It is unknown if Taillon was considered by the Grand Jury. All actions of Windsor, Logan and Jordan were investigative *All of this was pled with specificity in the Verified Complaint's 334 allegations* (App. 28-9, 41)

[10] Such withdrawal is lawful No allegation of wrongdoing was made by the bank or FinCen See 12 C F.R § 353.

parte and incorrectly advised him this transfer violated 'prior Orders' in the civil case and requested an immediate hearing.[11] Evans wrongfully disclosed the existence of the State Grand Jury investigation in violation of S.C.C.A. §14-7-1720 and the contents of the SAR in violation of 12 U.S.C. § 3401 and 12 C.F.R. § 353.[12]

The next day, a secret *ex parte* hearing was held in the *Tomz* civil case, wherein Evans and Condon appeared, assisted by Logan and Jordan, who filed knowingly false affidavits and divulged secret bank records of Taillon and the Field children.[13] At Evans' request, Field's bank accounts were frozen without notice. No criminal action existed and Evans did not request this freeze for the State's benefit or to aid a State Grand Jury matter or gain information.

At a second *ex parte* hearing on June 17, 2009,[14] Evans illegally provided Judge Few with the secret

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[11] Taillon was not a party in *Tomz* nor subject to any existing court Order She was never involved in any Securities Division matter involving CIF.

[12] If Evans obtained the records through Grand Jury investigation, disclosure violated S C C A 14-7-1720 and 12 U S C 3401

[13] The affidavits alleged specifics concerning bank transactions involving Allyson and Davyd Field, and Taillon at Greenville First. No transaction proved misappropriation of CIF funds The transfers were private funds moving from Greenville First to competitor banks, as clearly displayed on the checks in Evans' possession No CIF funds were transferred

[14] The transcript of such hearing was part of the record, even though the Fourth Circuit did not realize it and denied the right to file such transcript Apparently, the Fourth Circuit did not review the record during the 6 days it considered the case and dismissed same prior to receipt of Plaintiffs' Brief (App 1) No notice of the hearing was given to Field or Taillon

SAR.[15] Evans and Condon continually withheld exculpatory information from Judge Few. Condon lied to the Court concerning the date, source and substance of the transfers. Evans told Judge Few there was no criminal proceeding; Condon said there was no security proceeding. No statutory authority existed to issue a restraining order.

Evans convinced Judge Few to extend the *ex parte* Order to all assets of Field and Taillon, without demonstrating cause or the likelihood of immediate harm. Condon requested the Order be extended to the Field children: Davyd and Allyson. Neither child received notice of the hearing. Neither was a party to the action, nor a member of CIF, nor engaged in any wrongdoing. Judge Few restrained the children's assets and froze their bank accounts causing considerable damage.

Evans advised the *Greenville News* of the asset freeze; defendants provided copies of the confidential bank records to the media. McMaster held a news conference on June 19, 2009.[16] Headlines appeared on the front page of the *Greenville News*

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[15] Greenville First denied it issued any SAR to anyone other than FinCen. It remains unclear how Evans obtained it. Limited discovery would have revealed the source and contents, proving knowing violations by Evans, Windsor and/or Logan

[16] McMaster's press agent claimed the actions were taken in response to a civil subpoena issued by Condon, not to any criminal subpoena If Condon did issue civil subpoenas to a bank for any person's records, such person was entitled to notice thereof S C C.A § 35-1-602 and 12 U S.C § 3401 None was ever given and Condon's action would be illegal

broadcasting the account freeze, which is how Field and Taillon learned of it.[17]

Defendant(s) circulated the Order to local banks, directly interfering with the Fields' commercial transactions, including a check to the I.R.S., which Greenville First refused to pay.

On July 2, 2009, a third hearing was held before Judge Few on the restraining Order. Logan and Jordan came for the Criminal Division; Condon and Windsor for Securities.[18] Windsor submitted an affidavit containing hundreds of pages of bank records for Field, Taillon, Davyd and Allyson Field.

It was then confirmed no prior Order existed restraining Field(s)[19] and no CIF funds had been diverted. The restraining Order was terminated.

Despite the absence of any existing restraining Order or evidence of wrongdoing, McMaster's agent provided a statement to the *Greenville News* accusing Field and Taillon of criminal activity, and his comments and Windsor's affidavit and the secret bank records were published in the local media the next day.

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[17] No Order was ever served upon Field, Taillon or either child Jordan and Logan also disclosed information to third parties in violation of S C C A §14-7-1720 Jordan informed the media Field, CIF and Taillon were targets of criminal investigation

[18] No 'attorney appearance' was ever filed by Evans or Condon in the civil case Evans died on June 20, 2009 Why was the Securities Division present? Plaintiffs in the civil action never independently sought such freeze after the issues were joined.

[19] A comprehensive review of the civil Court's file would have revealed the absence of any existing restraint Evans and Condon intentionally lied about such circumstance to inflame Judge Few, who was relatively new to the matter

Condon advised Saad, the Court's Receiver, "Judge Few had just let a 'criminal' go." Condon was fully aware the Settlement Agreement required Field to work with Receiver Saad, who ultimately acted for Field's benefit.

Plaintiffs brought this action alleging violations of the 42 U.S.C. §§ 1983, 1985 and 1986, 12 U.S.C. § 3401 and S.C.C.A. § 14-7-1720 (App. 28, 41), with great specificity, which violations effectively caused the destruction of CIF and severe economic damage to Field, Taillon and Kelley.

C. Magistrate denies limited discovery and recommends summary judgment awarding absolute immunity for all Defendants against all Plaintiffs based on a Notice issued only to CIF. The Notice was wholly irrelevant to Taillon and should not have been controlling. Immunity can not extend that far.

Responding to defendants' motions for summary judgment, plaintiffs sought limited discovery of former Division employees, Chief Securities Examiner Pantsari and Condon. Magistrate relied on *Harlow v. Fitzgerald*, 457 U.S. 800, 818(1982) and *Anderson v. Creighton,* 483 U.S. 635,640(1987), notes 2 and 6, to stay discovery. (App. 25—26) Yet, *Anderson* Note 6 specifically foresees such discovery:

> ...if the actions Anderson claims he took are different from those...Creightons allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before Anderson's motion for summary judgment on qualified immunity

> grounds can be resolved...such discovery should be tailored specifically to the question of Anderson's qualified immunity.

See, also, *Crawford-El v. Britton*, 523 U.S.574 (1998).

Magistrate subsequently recommended all defendants be granted summary judgment on the basis of absolute immunity:

> In the Court's view, the Notice of Intent, filed May 11, 2007, put the entire office of the Attorney General in an advocates role against CIF, as a matter of law, even if additional investigations were pursued by other Divisions of the Attorney General's office, subsequent to that date. Critically, absolute immunity extends to "persons working under a prosecutor's direction, when they function as advocates for the state" and are clearly associated with the judicial process. *Bernard v. County of Suffolk*, 356 F.3d 495,502 (CA2 2004). This is equally true of investigators ...All defendants... enjoy the protection cast by Condon and McMaster's immunity shield raised in the discretionary and prosecutorial act of filing the Notice...[and] would bar all of the plaintiff's ... claims." (App. 37).

But, ***no determination was made against Field, Taillon or Kelley at ANY point.*** If CIF's registration statement contained misleading information, despite approval by the Chief Examiner, such statements belonged to CIF, not to any individual. None could be extrapolated to Taillon, a non-member, whose claims were ignored entirely by Magistrate and the court.

No probable cause determination was made as to Field, Taillon or Kelley and no immunity can exist to bar their claims, which are independent of CIF's. Magistrate's reliance on *Bernard* is incorrect. It holds, "absolute immunity shields [prosecutors] from suit ...for their alleged malicious or selective prosecution of plaintiffs, as well as for any misconduct in the presentation of evidence to the grand juries that returned the challenged indictments...." No prosecution of anyone ever took place herein. Magistrate elevated Condon from a complaining witness on a 'notice of intent' to the status of a prosecutor, contravening *Kalina v. Fletcher*, 522 U.S. 118,125 (1997) and enlarged his immunity to non-securities matters. Magistrate entirely ignored the subsequent disclosure of secret bank records of non-CIF members and the asset freeze of non-parties.

D. The District Court awards absolute immunity to Condon and McMaster, and qualified immunity to Evans, Windsor and Logan by shifting the burden of proof to the Plaintiffs, ignores Taillon's claims, and violates well-established procedure.

The District Court disagreed with Magistrate's Report, but awarded Condon prosecutorial immunity based upon an incorrect reading of *Thomas v. City of Peoria*, 580 F.3d 633, 638-39 (CA7 2009)[20]; *Goldstein*

[20] The arrest in *Thomas* was 'civil' because the crime charged by prosecutors was a traffic offense; this is not the same as a civil matter brought by a division having no criminal authority.

v. Moatz, 364 F.3d 205, 212 (CA4 2004)[21]; *Butz v. Economou*, 438 U.S. 478, 515 (1978); *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) and *Rex v. Teeples*, 753 F.2d 840, 844 (CA 1985) (distinguishing "between the prosecutor's quasi-judicial role warranting absolute immunity, and his 'police-related' work not accorded such immunity"). (App. 8-9). (See discussion, *infra*.)

The District Court ignored the fact Condon did not sign the Notice of Intent or act as an advocate, despite its observation in footnote 4 of the Order (App. 25). The Court manipulated the facts, stating "However, at the time of filing the Notice, the acting Assistant Attorney General moved into an adversarial realm more akin to advocating on behalf of the State. As such, Plaintiffs' objection that the magistrate judge erred in concluding that Condon is entitled to prosecutorial immunity is without merit." (App. 11) Condon was the investigator and complainant; Meyers was the 'prosecutor'. (App. 25) It is well settled, any immunity Meyers may have does not extend 'backwards' to include the investigator who reported to her. It was Meyers who exercised discretion to issue the Notice, not Condon, and she is not a party. The Court also ignored the inapplicability of the Notice to Field, Taillon and Kelley and did not address their independent claims.

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[21] Immunity was denied in *Goldstein, supra* The District Court also relied on *Springmen v. Williams*, 122 F 3d 211 (CA4 1997) (App 8) Therein, the Fourth Circuit granted immunity to the prosecutor, but not the investigating policeman. Immunity does not go backwards in time.

The District Court denied absolute immunity to Windsor: "...acted merely as an investigator and not as a prosecutor. While Windsor's findings may have aided in decisions to prosecute or initiate proceedings against Plaintiffs, Windsor did not act as a prosecutor nor were his tasks "inherently prosecutorial in nature." (App. 12--14) Since Condon's role essentially mirrored Windsor's, the result should not differ merely because Condon is an attorney. *Buckley, supra.*

The claims against Condon begin with the investigation, but continue with his rejection of the second application and culminate in his involvement in the civil trial, as discussed above. This fact pattern squarely presents the issues not dealt with by the District Court:

1) Is immunity permanent and all-encompassing?
2) Assuming, *arguendo*, Condon has absolute immunity, does it last forever and extend to non-parties?
3) Do *ultra vires* acts destroy immunity?
4) Does immunity cover every act pursued against anyone at all, or must such act be relevant to a statutory mandate?

The District Court acknowledged Evans was not eligible for prosecutorial absolute immunity. It cited 8 specific factual allegations of Constitutional violations by Evans contained in the Verified Complaint. Having done so, it oddly concluded, "Plaintiffs provide no further evidence aside from

their allegations. Consequently, the court finds that Plaintiffs have failed to assert a constitutional violation by Evans." (App. 19-20). It did the same with Windsor, Jordan and Logan. Plaintiffs were caught in a 'Catch-22', denied discovery by Magistrate and then penalized for no discovery by the District Court. Yet, there was no dispute the confidential bank records and SAR were presented before Judge Few and clearly reflected in the hearing transcript in the record below. This is clear proof of statutory and constitutional violations.

Plaintiffs sued McMaster for failing to oversee the conduct of his securities division, failing to train new attorneys in securities regulation and failing to ensure staffers did not deliberately violate federal and state laws *outside* the scope of their normal duties. Nevertheless, the court granted McMaster immunity based upon *Van de Kamp v. Goldstein*, 129 S. Ct. 855,863 (2009), but that case applied specifically to supervising the conduct of a prosecutor during a trial. (App. 12) No trial of any type took place here. It is the failure to prevent *ultra vires* acts, which leads to McMaster's liability under 42 U.S.C. § 1986. Plaintiffs alleged McMaster was a co-conspirator under 42 U.S.C. §1985(3). The District Court did not address either issue.

The allegations of the Verified Complaint[22] were set forth in great factual detail. Since Plaintiffs were deprived of discovery, they were entitled to have all factual decisions found in their favor in summary judgment. The District Court ignored such standard, and unfairly shifted the burden to Plaintiffs, which represents a significant departure from established law and procedure. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

In immunity cases, the plaintiffs' versions of the facts should be adopted in defending a summary judgment motion. *Scott v. Harris*, 127 S.Ct. 1769, 1774-75 (2007). When a court is confronted with facts that permit several different conclusions, all inferences from the underlying facts must be drawn in the nonmovant's favor, which the District Court failed to do. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Quaratino v. Tiffany & Co.*, 71 F.3d 58, 64 (CA2 1995).

Petitioners challenged the constitutionality of the taking without due process and the South Carolina Securities Act. Such challenge automatically states a valid and sufficient cause of action. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982).

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[22] "A properly verified complaint, insofar as it relates facts within the personal knowledge of the plaintiff, suffices as an affidavit under Rule 56(e)" *Davis v Zahradnick*, 600 F 2d 458 (CA4 1979) and may defeat summary judgment. *Williams v Griffin*, 952 F 2d 820, 823 (CA4 1991)

The District Court adopted a result not based on the limited record and differing from the Magistrate's. Both courts ignored the existence of genuine issues of material fact. Both adopted the defendants' version of the facts and refer thereto in their holdings. Both decisions disregard the case law and the Rules of Civil Procedure to Plaintiffs' great detriment.

The District Court's decision to preclude all discovery, grant immunity, and award summary judgment is a significant departure from the accepted and usual course of judicial proceedings and precedent, and the supervisory powers of this Court should be exercised. The matter should be remanded to correct these mishaps.

COMPELLING REASONS TO GRANT THE WRIT

These are issues of major national importance affecting all government. It is imperative the Court answer:

a) When is a government employee, not engaged in criminal law enforcement, eligible for absolute immunity?
b) Does immunity encompass persons not within the purview of such official and include acts outside the scope of the statutory mandate?
c) May a prosecutor step far outside the prosecutorial role, when no indictment has issued, and still receive immunity?
d) If immunity attaches, does it persist indefinitely, or can intervening events cause it to lapse, terminate, or be abandoned?
e) Is a government employee who leaks secret material to the media or publishes documents on the internet immune?
f) Who bears what level burden of proof in qualified immunity at summary judgment and should all discovery be precluded?
g) When does a supervisor become liable for failing to curb the unlawful *ultra vires* acts of subordinates, or for promoting such acts?

A. Summary: The Fourth Circuit interprets absolute and qualified immunity in contravention of U.S. Supreme Court decisions, and contradicts other Courts of Appeal, and the legislative intent of 42 U.S.C. §§ 1983, 1985 and 1986.

The Fourth Circuit decision upholding the District Court's Order conflicts with U.S. Supreme Court decisions and those of other Circuits on the issues of absolute and qualified immunity.[23] Further delineating the boundaries of absolute immunity under *Scheuer v. Rhodes*, 416 U.S. 232 (1974), is vital to the smooth functioning of all government. Yet, such boundaries must not be unduly extended in order to protect the citizenry and give meaning to the Civil Rights Act of 1871 and 42 U.S.C. §1983, *et seq.*[24]

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[23] The Fourth Circuit found no error in the record below, but did not address the legal, factual or procedural issues raised by Petitioners (App. 3) It was written by Motz, J , who dissented in *Goldstein v Moatz*, 364 F 3d 205 (CA4 2004), wherein the majority denied both absolute and qualified immunity in very similar factual circumstances This effectively overrules *Goldstein*, *supra*, without the benefit of a written opinion Argument herein is addressed primarily to the District Court's decision (App 6)

[24] If any incident of advocacy causes absolute immunity to attach to any official, the Civil Rights Act of 1871 and 42 U S C § 1983 are rendered meaningless. The mere filing of any government 'complaint' will provide 'instant' absolute immunity, which cannot have been the intent of Congress, and is historically improper. Respondents' conduct was so egregious, plaintiffs' receiver and defendants in the *Tomz* civil action joined forces to sue Condon, Evans and McMaster.

The Court should resolve the conflicting Circuit decisions, which followed *Imbler v. Pachtman*, 424 U.S. 409, 430(1976) and *Burns v. Reed*, 500 U.S. 478 (1991), explored more fully below.

As Circuit Judge Vance stated so movingly:

> Nothing divides this court like a section 1983 case. ...I write...to lament *the sorry state of the law under section 1983 that the fragmented decisions of this and the Supreme Court reflect. ... much of the case law under section 1983 is confused or misguided, and no longer corresponds to the reasons Congress enacted section 1983* ... I have not attempted to present solutions to all the inadequacies in the law under section 1983. I simply *lament these inadequacies in the hope that the Supreme Court will undertake a wholesale reevaluation of current law.*

Jones v. Preuit & Mauldin, 851 F.2d 1321(CA11 1988)(dissent, plurality decision granting immunity to private citizens)(emphasis added).

To the extent the Supreme Court has not ruled on these matters, this is a case of first impression of vital public policy affecting all aspects of state or federal government. To the extent this Court has set such policies, either the case law is vague or the District Court's decision grossly contradicts those policies and other Courts of Appeal. Such decision must not be permitted to stand.

B. The Fourth Circuit's award of absolute immunity to a civil attorney violates *Imbler v. Pachtman*. The subsequent extension of immunity against non-parties demonstrates the confusion surrounding immunity applied to non-prosecutors. This Court must clarify: whether such official acting illegally is entitled to immunity; what limits exist; and can immunity lapse or terminate?

This Court has never fully clarified what the absolute immunity standard is for an official not engaged in prosecution. An *ad hoc* approach is unjust and contravenes Congressional intent.[25]

The Supreme Court must address the novel issue of when a regulatory division attorney changes from being an investigator to a pseudo-prosecutor when the division has limited quasi-judicial, but no criminal authority. Are only hearing officers entitled to absolute immunity? Are advocates also entitled, and at what point does it vest? What if the decision to initiate administrative action is unchecked? Does all action qualify for absolute immunity? And, can immunity be made moot, lapse or abandoned by an

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[25] Under what theory could the court extend immunity, to encompass Taillon, who was not involved in the underlying matter? Does immunity know no bounds?

intervening event, or the *ultra vires* acts of the official?

Condon was an investigating securities attorney. Historically, such officials do not receive absolute immunity. Condon deliberately blocked CIF's security registration twice without due process or probable cause. [26] Long after all regulatory action had ceased by agreement, Condon interfered in a civil action and helped publish secret documents and freeze assets of non-members of CIF.

The District Court granted summary judgment awarding Condon absolute immunity. This was error and ignored relevant Supreme Court decisions, contradicts other Courts of Appeal, and vitiates the intent of 42 U.S.C. § 1983.[27]

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[26] Condon did not initiate or prosecute adversarial proceedings. If any existed, A A G. Meyers did and is not a party Did the withdrawal of the first application terminate any immunity when no Stop Order issued and no proceeding occurred?

[27] The Fourth Circuit upheld the District Court, before receiving Petitioner's Appeal Brief, finding no error in the record, and denied rehearing *en banc*. The District Court's decision contradicts itself, denying absolute immunity to Windsor, yet granting it to Condon for the same actions, *supra*

i. **The Fourth Circuit ignored or misapplied U.S. Supreme Court decisions and granted absolute immunity to an investigating attorney for unlawful acts.**

Absolute immunity is to be sparingly granted. *Forrester v. White*, 484 U.S. 219 (1988). "Because absolute immunity 'contravenes the basic tenet that individuals be held accountable for their wrongful conduct,' however, it is available only when its 'contributions...to effective government...outweigh the perhaps recurring harm to individual citizens." *Westfall v. Erwin*, 484 U.S. 292, 295(1988). Accord, *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *Burns v. Reed*, 500 U.S. 478 (1991); *Butz v. Economou*, 438 U.S. 478 (1978)(immunity for hearing officers).

Justice Powell wrote in *Nixon v. U.S.*, 457 U.S. 731,746 (1982):

> In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the Court considered the immunity available to state executive officials in a § 1983 suit alleging the violation of constitutional rights...we rejected the officials' claim to absolute immunity under the doctrine of *Spalding v. Vilas*, [161 U.S. 483(1896)] finding instead that state executive officials possessed a "good faith" immunity from § 1983 suits... Balancing the purposes of § 1983 against the imperatives of public policy, the Court held that "in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and

> responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." 416 U.S. at 247. ...*Scheuer* established a two-tiered division of immunity defenses in § 1983 suits. To most executive officers *Scheuer* accorded qualified immunity. For them the scope of the defense varied in proportion to the nature of their official functions and the range of decisions that conceivably might be taken in "good faith." This "functional" approach also defined a second tier, however, at which the especially sensitive duties of certain officials--notably judges and prosecutors--required the continued recognition of absolute immunity. See, e. g., *Imbler v. Pachtman*, 424 U.S. 409 (1976).

For other denials of absolute immunity to state officials see, e.g., *Hafer v. Melo,* 112 S.Ct. 358 (1991); *Procunier v. Navarette*, 434 U.S. 555 (1978) (prison officials); *Wood v. Strickland*, 420 U.S. 308(1975) (school board members); *O'Connor v. Donaldson*, 422 U.S. 563 (1975)(hospital superintendent). [28]

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[28] Cabinet members do not enjoy absolute immunity. *Harlow v. Fitzgerald,* 457 U S 800,811 (1982). "[M]ost...officials...entitled to absolute immunity from liability for damages are subject to other checks that help to prevent abuses of authority from going unredressed " *Mitchell v Forsyth,* 472 U S 511 (1985) If the U S. Attorney General is only eligible for qualified immunity, District Court herein grossly erred by awarding absolute immunity in an unchecked regulatory environment

As Justice Blackmun noted in *Cleavinger v. Saxner*, 474 U.S.193(1985)(absolute immunity denied to discipline committee members), "the line between absolute immunity and qualified immunity often is not an easy one to perceive and structure."

No immunity is afforded when acting as a complaining witness, as Condon did on the first application. See, *Malley v. Briggs,* 475 U.S.335 (1986); and *Kalina v. Fletcher*, 522 U.S.118, 127 (1997).

Condon's refusal to review the second application, mandated by statute, was a clear and knowing violation of law. Property was taken and destroyed without due process and without any possible appeal. Such action should not be accorded any immunity.

Condon, Evans and McMaster all made statements to the press, which are not immune. See, *Buckley v. Fitzsimmons,* 509 U S. 259, 277 (1993).

The District Court improperly placed the burden to overcome the absolute immunity claim on the plaintiffs.[29]

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[29] "The official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question" *Burns*, 500 U.S at 486 The District Court entered judgment without a hearing but incorrectly found all facts in Defendants' favor, See, *Schopler v Bliss*, 903 F 2d 1373(CA11 1990)(no immunity for damaging statements, all facts to be found in plaintiffs' favor, if no evidentiary hearing)

ii. **Numerous circuit Courts of Appeal decisions are in conflict with the Fourth Circuit's decision herein.**

Immunity law, as applied to state officials, remains in confusion with numerous conflicts between the Circuits, and often is inconsistent within the same Circuit, based upon the identity or role of the state official. Cases are handled in *ad hoc* fashion, based on the bias of the particular District Court.[30]

The First Circuit held attorneys in non-criminal divisions are eligible only for qualified immunity. *Guzman-Rivera v. Rivera-Cruz*, 55 F.3d 26 (CA1 1995). It awarded absolute immunity to a judicial receiver, but not his co-conspirators. *Kermit Construction Corp. v. Banco Credito Y Ahorro*, 547 F.2d 1 (CA1 1976). The First Circuit denied absolute immunity to a town planning board, which reviews planning applications, *Cutting v. Muzzey*, 724 F.2d 259,262 (CA1 1984). However, it awarded absolute immunity to a physician licensing board, *Bettencourt v. B'd of Registration*, 904 F.2d 772 (CA1 1990), noting the Sixth Circuit held to the contrary in *Manion v. Mich. B'd of Medicine*, 765 F.2d 590,596 (CA6 1985).

Confusingly, *Manion* was overruled by the Sixth Circuit in *Watts v. Burkhart*, 978 F.2d 269

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[30] See, *Brown v. Griesenauer*, 970 F 2d 431 (CA8 1992) for a discussion of the discordant treatment of immunity among Courts of Appeal and within the Eighth Circuit So many contradictions exist, it is impossible to include them all.

(CA6 1992) and then reinstated in *Holloway v. Brush,* 220 F.3d 767 (CA6 2000)(denying absolute immunity *en banc*) 8 years later—two complete about-faces after *Imbler* in 15 years.

The Sixth Circuit also holds no absolute immunity exists for advocates for non-testimonial, pretrial acts "despite any connection these might have to later testimony", *Gregory v. City of Louisville,* 444 F.3d 725 (CA6 2006). Nor is a municipal officer protected for fabricated testimony told to a prosecutor, even when later used in a prosecution. *Hinchman v. Moore*, 312 F.3d 198,205 (CA6 2002). Those who instigate a legal complaint do not benefit from absolute immunity. See, *Todd v. Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d 432 (CA6 2006).

The Second Circuit held likewise in *Diblasio v. Novello*, 344 F.3d 292 (CA2 2003). It also refused to grant immunity in other circumstances. See, *In re World Trade Center Disaster Site Litigation*, No. 06-5324 (CA2 2008); and *Wilkinson v. Russell*, 182 F.3d 89 (CA2 1999)(defendants not entitled to absolute immunity unless they demonstrate such complete protection is necessary to protect the judicial process, Sotomayor,J. citing *Hill v. City of New York,* 45 F.3d 653,660(CA2 1995)). It is split on how to determine the reasonableness of conduct which violates a Constitutional standard for immunity purposes, whether to apply a bifurcated test or the single one prescribed by the Supreme Court. See, *Walczyk v.*

Rio, 496 F.3d 139 (CA2 2007) (Sotomayor,J. concurring).[31]

The Third Circuit felt since public officials exercising discretionary powers may abuse their discretion, the immunity to be awarded them is qualified, rather than absolute, so civil damages can serve as a proper restraint. *Curley v. Klem*, 499 F.3d 199 (CA3 2007).

Decisions of the Fourth Circuit in immunity matters are often not in accord with decisions of other Courts of Appeal. Compare *Jihaad v. O'Brien*, 645 F.2d 556, 561 (CA6 1981), with *Ward v. Johnson*, 690 F.2d 1098 (CA4 1982). But, absolute immunity was *denied* in *Goldstein v. Moatz*, 364 F.3d 205, 212 (CA4 2004), wherein the Appeals Court reversed a finding of absolute immunity initially granted to officials in the Patent Office, in a case analogous to this one. And confusion reigns; see the chain of contradictory Fourth Circuit decisions in the single case: *Suarez Corp. Industries v. McGraw*, No.95-3093 (CA4 1997)(absolute immunity denied), and *Better Government Bureau, Inc. v. McGraw*, No. 96-1464 (CA4 1997)(immunity denied), confirmed in *In re Allen*, 106 F.3d 582 (CA4 1997) ("an official who

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[31] The District Court herein shifted the burden to demonstrate a violation of due process and a taking in violation of the Fifth Amendment were unreasonable onto Plaintiffs, thereby not only splintering the 'clearly established' inquiry, but destroying all semblance of justice. It then held Plaintiffs failed to do so and granted defendants qualified immunity This was clear error. *Walczyk. supra* Although there may be a new 'heightened pleading' standard after *Celotex Corp. v. Catrett*, 477 U.S 317(1986), it was still error to deny discovery and grant summary judgment

performs an act clearly established to be beyond the scope of his discretionary authority is not entitled to claim qualified immunity under § 1983.") followed by *Suarez Corp. Industries v. McGraw*, 202 F.3d 676 (CA4 2000).

In an analogous case, the Fifth Circuit recognized the filing of a verified complaint was not entitled to absolute immunity, *Austin v. Borel*, 830 F.2d 1356, 1363 (CA5 1987), nor was the testimony of any experts which supported probable cause proceedings. *Keko v. Hingle,* 318 F.3d 639(CA5 2003).

The Eighth Circuit denied absolute immunity to State Health Department officials, who suspended a license to do business based upon investigation conducted by those same officials—factually similar to this case. *Freeman v. Blair,* 793 F.2d 166 (CA8 1986). However, it granted absolute immunity for defending prisoner's rights in a court hearing, while noting, "this cloak of immunity is limited to the attorney's performance of regular advocacy functions, and like the immunity afforded prosecutors, does not extend to intentional misconduct accomplished outside of the scope of the attorney's function as an advocate for the state." *Murphy v. Morris*, 849 F.2d 1011 (CA8 1988).

The Ninth Circuit denied absolute immunity to Health Department officials, who summarily closed a day care center in an analogous regulatory matter. *Chalkboard, Inc. v. Brandt,* 879 F.2d 668, 671 (CA9 1989). And, the Eleventh Circuit often refuses both absolute and qualified immunity. See, e.g., *Parker v. Williams*, 862 F.2d 1471(CA11 1989).

The D.C. Circuit reversed a district court and refused to grant absolute immunity to a government social worker who investigated and helped initiate a child neglect action filed in a court, similar to Condon's role herein. *Gray v. Poole,* 275 F.3d 1113 (D.C.Cir. 2002). Judge Ginsburg denied absolute immunity and noted the hugely confused rulings among the Circuits in *Martin v. Malhoyt*, 830 F.2d 237 (D.C.Cir. 1987).

Various Circuits have accorded absolute immunity to social workers when performing quasi-prosecutorial duties. *Salyer v. Patrick*, 874 F.2d 374 (CA6 1989); also *Vosburg v. Department of Social Servs.,* 884 F.2d 133 (CA4 1989), while others disagree. *Snell v. Tunnell*, 920 F.2d 673 (CA10 1990). The Sixth Circuit determination for social workers varies based upon their activity; denying absolute immunity for administrative, investigative functions or those as a legal advocate in the judicial process, as opposed to quasi-judicial ones, *Achterhof v. Selvaggio*, 886 F.2d 826, 830 (CA6 1989);. *Holloway, supra.* [32]

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[32] That dichotomy was raised in *Hoffman v. Harris*, 114 S Ct. 1631(1994), cert den. Justices Thomas and Scalia urged consideration, "*The federal courts do not have a license to establish immunities from § 1983 actions in the interests of what [they] judge to be sound public policy. Tower v. Glover,* 467 U S. 914, 922-923 (1984). We should address the important threshold question whether social workers are, under any circumstances, entitled to absolute immunity " (Dissent)

Only a few Courts of Appeal have faced the issue of termination or lapse of immunity as a result of intervening events, and no clear rule of law yet exists. See, *Houston v. Partee,* 978 F.2d 362,365 (CA7 1992) and *Spurlock v. Thompson*, 330 F.3d 791(CA6 2003).

Immunity can't continue indefinitely. Any 'immune' nature of Condon's work must have ended when CIF withdrew its first application. No Stop Order had issued and none was pursued on the second application. And, if not prior thereto, the Closure Agreement in February, 2008, must have terminated Condon's 'immunity'. There was nothing left for the Securities Division to do once CIF had been effectively deprived of registration and forced to close its business; Condon's subsequent involvement was beyond the scope of his duty.

Condon's and Evan's *ultra vires* and unlawful actions cannot be protected by immunity. They had no standing in the civil case, no reason to be there and knew such actions and the disclosure of secret or confidential bank documents to the media violated statutes and well established constitutional rights.[33] *Schloss v. Bouse*, 876 F.2d 291(CA2 1989).

However, it was noted by the Second Circuit the existing Supreme Court cases do not adequately determine the endpoint of immunity. *Parkinson v. Cozzolino*, 238 F.3d 145 (CA2 2001). Nor has the

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[33] It was unclear if such actions were authorized It was clear error to deny limited discovery when qualified immunity was at issue, *Dimeglio v Haines*, 45 F 3d 790 (CA4 1995)

issue of supervisory immunity been clarified. McMaster's liability turns thereon. 42 U.S.C. § 1986.

The Court's opinion in *Pearson v. Callahan,* 129 S.Ct. 808 (2009) refers to the confusion among the Circuits following *Saucier v. Katz,* 533 U.S. 194 (2001) and attempts a resolution. This case demonstrates things have not improved. [34]

These discordant divisions of law and application of absolute immunity between and within the Circuits must be resolved. Only a definitive ruling from the Supreme Court can accomplish this.

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[34] This issue is again before the Supreme Court, *Thompson v. Connick,* (#09-571 10/6/2010) appealing *Thompson v Connick* 578 F 3d 293 (CA5 2009)(immunity denied--prosecutorial misconduct and failure to supervise) If such decision overrules the lower court(s) herein, remand is requested in light thereof

C. **Is a prosecutor acting far outside the scope of her authority entitled to any immunity? The Fourth Circuit incorrectly awarded qualified immunity pre-indictment to a prosecutor and a securities attorney for wrongful and illegal acts in a civil case and for publishing secret records to the media.**

The District Court awarded Evans qualified immunity for her unlawful actions in the civil case. Such decision directly contradicts the holdings of the Supreme Court and other Courts of Appeal. She should not be entitled to any immunity.

There are no bright line rules answering:

a) During the pre-indictment phase, what acts are considered outside the scope of investigation by a prosecutor or beyond statutory mandate?
b) Is the immunity so large it encompasses persons not being investigated by the Grand Jury?
c) If immunity attaches, can it be shed, either temporarily or permanently, for acts not within the scope of prosecutorial duty?
d) Is the immunity absolute for some acts and only qualified for others?
e) If an indictment never issues, are the preceding questions answered differently?

This Court's stance on prosecutorial immunity was recently summarized in *Atherton v. D.C. Office of the Mayor*, 576 F.3d 672 (D.C.Cir. 2009):

> "The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges...acting within the scope of their duties." *Imbler*, 424 U.S. at 422-23. ...absolute prosecutorial immunity turns on the function performed by the prosecutor. Absolute immunity is granted only for conduct "intimately associated with the judicial phase of the criminal process." *Id.* at 430...courts look to whether the particular activity...was performed by a prosecutor in...official capacity as an advocate for the state in the course of judicial proceedings. See *Kalina v. Fletcher*, 522 U.S. 118,125 (1997). A prosecutor is not entitled to absolute immunity when performing "administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

The Tenth Circuit stated in *Rex v. Teeples*, 753 F.2d 840 (CA10 1985) (incorrectly cited App.13):

> A prosecutor has the burden of establishing that he was an "advocate" for each function at issue. See *Burns v. Reed*, 500 U.S. at 486; see also *Buckley*.... In short, until charges have been filed against an individual, a prosecutor is not absolutely immune... *Hart v. O'Brien*,

127 F.3d 424 (CA5 1997). Absolute prosecutorial immunity extends no further than necessary to protect those activities. See *Harlow v. Fitzgerald*, 457 U.S. 800,811 (1982).

And the Third Circuit held in *Odd v. Malone*, 538 F.3d 202 (CA3 2008):

> A prosecutor bears the "heavy burden" of establishing entitlement to absolute immunity. *Light v. Haws*, 472 F.3d 74, 80-81 (CA3 2007). In light of the Supreme Court's "quite sparing" recognition of absolute immunity to § 1983 liability, we begin with the presumption that qualified rather than absolute immunity is appropriate. *Carter v. City of Philadelphia*, 181 F.3d 339, 355 (CA3 1999) (citing *Burns v Reed*, 500 U.S. 478, 486-87 (1991)). To overcome this presumption, a prosecutor must show that...she was functioning as the state's advocate when performing the action(s) in question. *Yarris* v. *County of Delaware*, 465 F.3d at 136 (CA3 2006).

Absolute immunity "extends only so far as necessary to protect a prosecutor's decision with respect to the initiation and conduct of particular cases. *Imbler* does not, in our reading, immunize prosecutors for any and all measures they may undertake in the course of wide-ranging law enforcement investigations or general fact-finding

expeditions."[35] *Briggs v. Goodwin,* 569 F.2d 10 (D.C. Cir. 1977), cert. denied, 437 U.S. 904 (1978).

The Ninth Circuit observed in *Al-Kidd v. Ashcroft,* 580 F.3d 949 (CA9 2009)(denying Attorney General immunity):

> As the Supreme Court has acknowledged, the distinction between the roles of "prosecutor" and "investigator" is not always clear. See *Imbler,* 424 U.S. at 431 n.33 ("Drawing a proper line between these functions may present difficult questions..."). The Supreme Court has given us few bright lines. Note 9: One bright line the Supreme Court has given is that a "prosecutor neither is, nor should he consider himself to be, an advocate before he has probable cause to have anyone arrested." *Buckley,* 509 U.S. at 274. The converse, however, is not true: *the mere presence of probable cause to have someone arrested "does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards."* *Id.* at 274 n.5. (Emphasis added)

There is no immunity for any official when acting outside of mandated authority. *Ricci v. Key Bancshares of Maine, Inc.*, 768 F.2d 456,462 (CA1

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[35] See *Apton v. Wilson,* 506 F.2d 83, 91, 93-94 (D.C Cir 1974), *Guerro v. Mulhearn,* 498 F 2d 1249, 1256 (CA1 1974), *Hampton v. City of Chicago,* 484 F 2d 602, 608-09 (CA7 1973) (Stevens, J), cert. den , 415 U S. 917 (1974); *Littleton v. Berbling,* 468 F 2d 389, 410-11 (CA7 1972), cert den., 414 U S. 1143 (1974), *Dodd v. Spokane County, Washington,* 393 F.2d 330 (CA9 1968)—all denying absolute immunity when prosecutor acts outside of jurisdiction

1986); *Doe v. Phillips*, 81 F.3d 1204 (CA2 1996)(prosecutor forfeits immunity).

The Eleventh, Second, and Ninth Circuits, and the Western District of Virginia within the Fourth Circuit, have similarly held that an official acting beyond the scope of his authority may not claim even qualified immunity. *Shechter v. Comptroller of New York*, 79 F.3d 265, 268-70 (CA2 1996); *Lenz v. Winburn*, 51 F.3d 1540, 1545-47 (CA11 1995); *Merritt v. Mackey*, 827 F.2d 1368, 1373 (CA9 1987); *Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal*, 922 F. Supp. 1131 (W.D. Va. 1996).

Evans convened a State Grand Jury in 2008. No indictment ever issued against Field, Taillon or Kelley. Evans and Condon had no reason to interfere in the civil action, or to block the settlement, or obtain an asset freeze or publish secret records. No criminal or securities investigation was aided thereby.

This case demonstrates the need for 42 U.S.C. § 1983. If Field telephoned Judge Few at home at night, the judge would never have answered the phone. Even an attorney would not engage in *ex parte* conversations with the presiding judge. Judge Few took the improper call solely because Evans was Chief Prosecutor. He listened to her and examined material transmitted to him. Who else other than the Chief Prosecutor could secure an immediate *ex parte* hearing to freeze bank accounts without proving emergent need? Who else would possess confidential bank records and secret FinCen reports? Who else could convince a judge to impose an

unlawful asset freeze and extend it to three non-parties without due process? Who else could offer 'evidence' without being sworn as a witness?[36] Who else could illegally provide copies of bank records to the media without fear of reprisal? Nobody. Such acts took outrageous advantage of the vast authority reposed in Evans and Condon and were fully alleged in the Verified Complaint.

Confirmation of civil settlement without liability to Field or Kelley was imminent. Condon sought to block the settlement to harm them. The asset freeze was sought solely to harm the Field family. Neither activity was relevant to any state action. Press releases caused huge damage. Dr. Field's career was ruined. Kelley can't find employment. Allyson Field could not receive emergency medical care. Taillon suffered.

There can be no justification for the court's decision to grant Evans or Condon *any* immunity when the Verified Complaint and affidavits substantiated they violated clearly established rights any reasonable person would know. *Ridpath v. Board of Governors Marshall University*, 447 F.3d 292 (CA4 2006); *Taft v. Vines*, 70 F.3d 304(CA4 1995).[37]

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[36] And, when Condon and Evans offered evidence, they became witnesses, but without immunity. See, *Cruz v. Kauai County*, 279 F 3d 1064 (CA9 2002) However, the Kauai prosecutor did not know she was violating clearly established rights or offering false evidence Condon and Evans were fully aware they did so, deliberately misled the court, and forfeited qualified immunity.

[37] The denials of limited discovery and the request to supplement the Complaint caused harmful error to the *pro se*

D. When does the Attorney General become liable for the unlawful acts of subordinates or his own misconduct? The Fourth Circuit ignored Supreme Court decisions and those of other Courts of Appeal concerning 42 U.S.C. §§ 1985 and 1986.

Despite being Securities Commissioner, McMaster provided no training in securities investigation, regulation or oversight. For instance, CIF often received contradictory directives from different Division officials on the same matter.

McMaster exhibited a reckless disregard for the actions of his subordinates. McMaster permitted Condon, a new attorney, to run amok in the Securities Division. He allowed Condon to unlawfully reject a properly filed application without review, to issue subpoenas after all investigations were closed, and to intervene in a civil action wherein the state was not a party. McMaster failed to prevent, oversee, or terminate such clear violations of law and the established rights of the plaintiffs. The District Court incorrectly awarded him absolute immunity even without any prosecution

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Plaintiffs. The District Court did not agree absolute immunity should be granted Evans, Windsor or Logan, but then ruled against Plaintiffs for not producing evidence to overcome qualified immunity, which could have been obtained in discovery. The District Court also held Plaintiffs did not specify which Defendant had performed what act, or with whom Evans was involved. (N.6 App 26) The Supreme Court must clarify whether 42 U.S C. § 1985 requires such proof at the summary judgment stage

of Taillon, Kelley or Field, in contravention of *Mitchell v. Forsyth, supra.*

As Attorney General, McMaster conducted news conferences, and allowed internet postings and press releases without due care for the content or the harm caused. He permitted secret bank records to be obtained without observing legal formalities.

McMaster allowed Evans to contact a civil judge *ex parte*, engage in secret hearings, obtain illegal bank account freezes and publish all of it to the press without first obtaining an indictment. Either McMaster encouraged this activity to enhance his gubernatorial campaign, or he was recklessly derelict in his duty.

Larez v. City of Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991) held:

> [D]irect, personal participation is not necessary to establish liability for a constitutional violation. Supervisors can be held liable for the actions of their subordinates (1) for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence in the constitutional deprivation by subordinates; or (4) for conduct that shows a reckless or callous indifference to the rights of others.

And, "Any one of these bases will suffice to establish the personal involvement of the defendant in the constitutional violation." *Al-Kidd, supra.* This Court needs to establish a bright line test so the public and officials will know what conduct is prohibited and what is entitled to absolute or qualified immunity.

CONCLUSION

For the foregoing reasons, it is respectfully requested this Court grant writ of certiorari and consider these vital national issues. In absence thereof, petitioners request the Court vacate the Fourth Circuit decision as to Field, Taillon and/or Kelley, and remand this matter to the District Court for trial.

Respectfully submitted,

Arthur M. Field
310 Thornblade Blvd.
Greer, SC 29650
(864) 419-6609 (cell)
Arthur-field@charter.net

APPENDIX

Court Of Appeals Dismissal of Appeal

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 10-1957

ARTHUR M. FIELD, PhD.; KATHRYN TAILLON; T. BART KELLEY,

Plaintiffs – Appellants,

and

CAPITAL INVESTMENT FUNDING LLC, Jerry T. Saad, Receiver for Capital Investment Funding LLC,

Plaintiff,

v.

HENRY D. MCMASTER, Individually and as Securities Commissioner of South Carolina; WILLIAM JOSEPH CONDON, JR., Individually and as Assistant Securities Commissioner; TOMMY WINDSOR, Individually and as Securities Investigator; JOE F. JORDAN, JR., Individually and as an Investigator of the Attorney General;

JENNIFER EVANS, as personal representative; LANSING LOGAN, Individually and as a Special Investigator of the Attorney General; OFFICE OF THE ATTORNEY GENERAL, State of South Carolina,

Defendants - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Greenville. Henry M. Herlong, Jr., Senior District Judge. (6:09-cv-01949-HMH)

Submitted: October 14, 2010 Decided: October 20, 2010

Before MOTZ, KING, and DAVIS, Circuit Judges.

Affirmed by unpublished *per curiam* opinion.

Arthur M. Field, Kathryn Taillon, T. Bart Kelley, Appellants Pro Se. William Henry Davidson, II, Kenneth Paul Woodington, DAVIDSON, MORRISON & LINDEMANN, PA, Columbia, South Carolina; Evan Markus Gessner, Michael Stephen Pauley, LIDE & PAULEY, LLC, Lexington, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Arthur M. Field, Kathryn Taillon, and T. Bart Kelley appeal the district court's order adopting in part the magistrate judge's recommendation and

granting summary judgment in favor of several state employees in this 42 U.S.C. § 1983 (2006) action. We have reviewed the record and find no reversible error. Accordingly, we deny the Appellants' motion to file a state transcript as an attachment to their informal brief and affirm for the reasons stated by the district court. *Field v. McMaster*, No. 6:09-cv-01949-HMH (D.S.C. Aug. 17, 2010). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

District Court's Order Granting Summary Judgment

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION
Civil Action No.: 6-09-1949-HMH-BHH

Arthur M. Field, Ph.D.; Kathryn Taillon;
T. Bart Kelley; and
Capital Investment Funding, LLC.
Plaintiffs,

v.

Henry D. McMaster, Individually, and as Securities Commissioner of SC; William J Condon, Jr. Individually and as Assistant Securities Commissioner; Tommy Windsor, Individually and as a Securities Investigator; Joe F. Jordan, Jr., Individually and as an Investigator of the Attorney General; Jennifer Evans, by Personal Representative; Lansing Logan, individually and as a Special Investigator of the Attorney General,
Defendants.

This matter is before the court with the Report and Recommendation of United States Magistrate Judge Bruce Howe Hendricks, made in accordance with 28 U.S.C. 636(b) and Local Civil Rule 73.02 of the District of South Carolina. N.1 Defendants filed motions for summary judgment on March 11, 2010 and March 12, 2010. In her Report and Recommendation, Magistrate Judge Hendricks recommends granting in part and denying in part Defendants' motions for summary judgment. (R & R 13-14.)

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are principals of Capital Investment Funding, LLC ("CIF"). Defendants are current or former employees of the South Carolina Attorney General's Office ("the Office"). On May 11, 2007, the Securities Division of the Attorney General's Office ("the Division") issued a Notice of Intent to Seek a Stop Order ("Notice") against CIF alleging that "the registration statement submitted by [CIF was] incomplete, false, misleading and tends to work a fraud upon purchasers." (Defs. Mem. Supp. Summ. J. Ex. 11 (Notice at 1).) Plaintiffs allege that the issuance of the Notice "was a ruse" and Defendant William J. Condon ("Condon") has a personal vendetta against Plaintiffs. (Pl Mem.Opp'n Summ.J. 8-17.)

Plaintiffs filed suit against Defendants on July 22, 2009, alleging numerous claims against Defendants. Particularly, Plaintiffs allege that Defendants deprived them of their civil rights in violation of 42 U.S.C. 1983, 42 U.S.C. 1985, 18 U.S.C. 1961 and 42 U.S.C. 1986. (Compl., generally.) Plaintiffs also assert numerous state law claims against Defendants. (Id.)

Defendants Henry D. McMaster ("McMaster"), Tommy Windsor ("Windsor"), Joe F. Jordan, Jr. ("Jordan"), Jennifer Evans, by personal representative ("Evans"), and Lansing Logan ("Logan") filed a motion for summary judgment on March 11, 2010. Condon filed a motion for summary judgment on March 12, 2010. Plaintiffs filed a memorandum in opposition to Defendants' motions for summary judgment on April 19, 2010.

Defendants filed replies on April 28, 2010. On June 30, 2010, Magistrate Judge Hendricks filed a Report and Recommendation recommending that the court grant in part and deny in part Defendants' motions for summary judgment. (Report and Recommenation 13-14.)

On July 8, 2010, Plaintiff Arthur M. Field ("Field") filed objections joined by Plaintiffs Kathryn Taillon ("Taillon") and T. Bart Kelley ("Kelley"). On July 9, 2010, Taillon filed objections joined by Field. On July 13, 2010, Condon filed objections. On July 15, 2010, CIF filed objections. Kelley filed additional objections on July 16, 2010, joined by Field and Taillon. The remaining Defendants filed objections on July 22, 2010. Condon filed a reply to Plaintiffs' objections on July 21, 2010. On July 22, 2010, the remaining Defendants filed a reply to Plaintiffs' objections. On July 27, 2010, Field filed a reply. This matter is now ripe for consideration.

II. DISCUSSION OF THE LAW

A. Report and Recommendation

Magistrate Judge Hendricks concluded that prosecutorial immunity "bars all of the plaintiff's federal and state law claims for money damages." (Report and Recommendation 10.) As such, the magistrate judge recommends that "the plaintiffs' federal and state law claims... be dismissed with prejudice to the extent they seek money damages or declaratory relief [and] [i]n regards to the plaintiffs' claims for injunctive relief, [Defendants'] motions should be denied." (Id. 13-14.)

B. Objections

Plaintiffs and Defendants filed objections to the Report and Recommendation. Objections to the Report and Recommendation must be specific. Failure to file specific objections constitutes a waiver of a party's right to further judicial review, including appellate review, if the recommendation is accepted by the district judge. See *United States v. Schronce*,

727 F.2d 91, 94 & n.4 (4th Cir. 1984). In the absence of specific objections to the Report and Recommendation of the magistrate judge, this court is not required to give any explanation for adopting the recommendation. See *Camby v. Davis*, 718 F.2d 198, 199 (4th Cir. 1983). Plaintiffs raise one specific objection to the Report and Recommendation. N.2. Plaintiffs argue that the magistrate judge erred in finding that Defendants are immune from suit because of prosecutorial immunity. (Field Objections, generally.); (Taillon Objections, generally.) Condon also raises one specific objection. Condon argues that Plaintiffs' claims against him for injunctive relief are moot because he is no longer employed with the Office. (Condon Objections 1-2.) Additionally, Defendants McMaster, Windsor, Jordan, Evans, and Logan raise one specific objection to the magistrate judge's Report and Recommendation. They argue that the magistrate judge erred by not recommending that summary judgment be granted on Plaintiffs' claims for injunctive relief because Plaintiffs have not shown irreparable harm. (Defs. Objections,generally.)

1. Prosecutorial Immunity

Plaintiffs argue that the magistrate judge erred in concluding that Defendants are immune from suit by prosecutorial immunity. (Field Objections, generally.); (Taillon Objections, generally.) As stated above, Defendants are current or former employees (N.3) of the Office.

A prosecutor is absolutely immune from suit for "conduct in initiating and in presenting the State's case." *Springmen v. Williams*, 122 F.3d 211, 213 (4th Cir. 1997) (internal quotation marks omitted). Absolute immunity applies whether a prosecution is "civil, or criminal, or merely . . . administrative." *Thomas v. City of Peoria*, 580 F.3d 633, 638-39 (7th Cir. 2009). "[T]he purpose of absolute immunity is not to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation." *Goldstein v. Moatz*, 364 F.3d 205, 212 (4th Cir. 2004) (internal quotation marks omitted).

> [A]gency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought.

Butz v. Economou, 438 U.S. 478, 515 (1978). "[A]cts undertaken by a prosecutor in preparing for the

initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). "A prosecutor . . . is not protected by absolute immunity for his activities prior to a probable cause determination, because he is not yet–and should not yet be–acting as an advocate." Goldstein, 364 F.3d at 214. "We therefore must determine whether, in this setting, . . . Defendants are akin to prosecutors possessing probable cause and exercising their discretion, or whether they are akin to investigators involved in pre-probable-cause activities." Id. at 215.

a. Condon

At all times relevant to the facts raised in the complaint, Condon served as an Assistant Attorney General with the Enforcement Branch of the Securities Division of the Office. (Condon Mem. Supp. Summ. J. Ex.1 (Condon Aff. ¶ 1).) The majority of Plaintiffs' allegations are directed at Condon's actions. (Compl., generally.); (Pls. Mem. Opp'n Summ. J., generally.) "On or about February 15, 2007, [Condon] was approached by . . . an attorney with the Registration Branch of the Securities Division of the [Office], who requested that [Condon] review documents filed by [Field] . . . in connection with [CIF]." (Condon Mem. Supp. Summ. J. Ex.1 (Condon Aff. ¶ 2).) "On...May 11, 2007, the Securities Commissioner issued a [Notice] Denying Effectiveness to a Registration Statement and to Seek the Issuance of an Order Revoking Available Exemption on the grounds that the Securities

Commissioner had reason to believe the Registration Statement submitted by CIF was incomplete, false, misleading or tended to work a fraud upon purchasers."N.4 (Id. Ex.1 (Condon Aff. ¶ 3).) Plaintiffs allege that in 2007 Condon "began a systematic persecution of CIF and Field." (Pls. Mem. Opp'n Summ. J. 7.) Plaintiffs allege that Condon "abused his position in the Securities Division" to intentionally "do anything he could to close down CIF." (Id. 7-10.) Condon argues that he is immune from suit by absolute prosecutorial immunity and if not prosecutorial immunity, by qualified immunity. (Condon Mem. Supp. Summ. J., generally.)

Condon's actions were prosecutorial in nature and he is absolutely immune from suit. According to the Notice, after considering documentation relating to CIF, the Division had "reason to believe that the registration statement submitted by [CIF was] incomplete, false, misleading, and tends to work a fraud upon purchasers." (Defs. Mem. Supp. Summ. J. Ex. 11 (Notice).) Additionally, the Notice explained that the Division intended to "seek the issuance of a stop order, pursuant to S.C. Code Ann. § 35-1-306(a), denying effectiveness of the registration statement filed by [CIF]" and "seek the issuance of an order, pursuant to S.C. Code Ann. § 35-1-204, revoking as to [CIF] any exemption in S.C. Code Ann. § 35-1-202 under which [CIF] without registration is offering or may offer securities to existing note holders or to other South Carolina investors." (Id. Ex. 11 (Notice).)

Plaintiffs argue that the Notice "is not a finding of probable cause" and since "no indictment" has been filed against them, Condon is not entitled to absolute

immunity. (Field's Objections 7.) The decision to issue a stop order is a discretionary decision that exceeds mere investigation. See Goldstein, 364 F 3d at 215 ("Once a prosecutor possesses probable cause, he must decide whether to prosecute, which charges to initiate, what trial strategy to pursue, and a multitude of other important issues that require him to exercise discretion. In a pre-probable-cause investigation, on the other hand, a prosecutor exercises no more discretion than a police officer and thus should enjoy no more protection than qualified immunity.") Courts have consistently viewed the dividing line to determine whether absolute or qualified immunity applies as whether the function taken by the Defendant was more akin to that of a police officer or a prosecutor's quasi-judicial role. See e.g., *Rex v. Teeples*, 753 F.2d 840, 844 (10th Cir. 1985) (distinguishing "between the prosecutor's quasi-judicial role warranting absolute immunity, and his 'police-related' work not accorded such immunity").

Prior to issuing the Notice, the Division investigated its concerns about CIF's financial matters by requesting information about their financial statements and by engaging a Certified Public Accountant to review CIF's financial statements. (Defs. Mem. Supp. Summ. J. Ex. 11 (Notice).) However, at the time of filing the Notice, the acting Assistant Attorney General moved into an adversarial realm more akin to advocating on behalf of the State. As such, Plaintiffs' objection that the magistrate judge erred in concluding that Condon is entitled to prosecutorial immunity is without merit.

b. McMaster

Plaintiffs argue that McMaster failed to adequately and properly train and/or oversee Defendants from conspiring to violate Plaintiffs' civil rights pursuant to 42 U.S.C. §§ 1983,1985, and 1986. (Compl. ¶¶ 242-53.) McMaster is also shielded from suit by prosecutorial immunity. To allow suit against a supervising prosecutor to go forward would create "practical anomalies." *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 863 (U.S. 2009). "[B]ecause better training or supervision might prevent most, if not all, prosecutorial errors at trial, permission to bring such a suit...would grant permission to...defendants to bring claims in other similar instances, in effect claiming damages for...training or supervisory failings." Id. "Most important, the ease with which a plaintiff could restyle a complaint charging a ...failure [by the prosecutor] so that it becomes a complaint charging a failure of training or supervision [by the presecutor's supervisor] would eviscerate" prosecutorial immunity.*Id.* Consequently, McMaster is entitled to absolute immunity and Plantiffs' objection is without merit.

c. Windsor

Windsor is an investigator with the Division. His duties "include the investigation of cases in which allegations of securities fraud are present that might lead to the filing of civil enforcement charges, as directed by the attorneys under whose supervision [he] work[s]." (Defs. Mem. Supp. Summ. J. Ex. 13 (Windsor Aff. ¶ 3).) Windsor has been involved with the civil investigation of CIF and Field since 2003. (Id. Ex. 13 (Windsor Aff. ¶ 4).) During his

investigation, "any investigative activities . . . were taken at the direction of one or more attorneys in the . . . Division." (Id. Ex. 13 (Windsor Aff. ¶ 4).) During the course of his investigation, Windsor submitted an affidavit in a state court civil action involving CIF and Field, *Tomz v. Capital Investment Funding, LLC*, C/A No. 2008-CP-23-3665, detailing some of his findings of suspicious banking transactions. (Id. Ex. 13 (Attach. 1 Windsor Aff. ¶ 9).) Plaintiffs allege that Windsor's involvement in *Tomz* was "purely malicious." (Field Objections 16.)

Plaintiffs argue that "Windsor is an investigator and could not act as an advocate. His actions from 2003 through 2007 cannot be eligible for absolute immunity." (Id. at 7.) The court agrees. Windsor is not immune from suit by prosecutorial immunity. Windsor acted merely as an investigator and not as a prosecutor. While Windsor's findings may have aided in decisions to prosecute or initiate proceedings against Plaintiffs, Windsor did not act as a prosecutor nor were his tasks "inherently prosecutorial in nature." *We, the People, Sakima Iban Salih El Bey v. McMaster*, No. 3:07-2137, 2008 WL 1849800, at *6 (D.S.C. Apr. 24, 2008) (unpublished). However, Windsor is entitled to qualified immunity.

"[G]overnment officials performing discretionary functions generally are granted a qualified immunity and are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

Wilson v. Layne, 526 U.S. 603, 614 (1999) (internal quotation marks omitted).

> What this means in practice is that whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.

Id. (internal quotation marks omitted).

> [C]learly established for purposes of qualified immunity means that [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 614-15 (internal quotation marks omitted).

In *Saucier v. Katz*, 533 U.S. 194, 201 (2001), the United States Supreme Court established a "two-step sequence for resolving government officials' qualified immunity claims." *Pearson v. Callahan*, 129 S. Ct. 808, 815 (U.S. 2009). "First, a court [has to] decide whether the facts that a plaintiff...allege[s]...[set] out a violation of a constitutional right. Second, if the

Plaintiff...satisfie[s] this first step, the court...decide[s] whether the right at issue was 'clearly established' at the time of defendant's alleged

misconduct." Id. at 815-16 (internal citations omitted). In *Pearson*, however, the United States Supreme Court held that "while the [*Saucier* test] is often appropriate, it should no longer be regarded as mandatory." Id. at 818. "The judges of the district courts . . . should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." Id.

Plaintiffs have failed to allege that Windsor has violated their constitutional rights. Thus, Plaintiffs failed to satisfy the first prong of Saucier. Plaintiffs broadly assert that Windsor "knew [his] conduct bore the risk of violating [Plaintiffs'] clearly established constitutional rights under the First, Fourth, Fifth and Fourteenth Amendments." (Pls. Mem. Supp. Summ. J. 17.) Plaintiffs' complaint, however, fails to specifically establish that Windsor violated their constitutional rights. Plaintiffs mainly allege that Windsor exceeded the scope of his authority during his investigation of CIF and Field, provided false statements in various affidavits, and formed an illegal enterprise with Condon to "close CIF." (Compl. ¶¶ 61-64, 77, 84, 173, 179, 184, 212, 217-18, 226, 229.) Plaintiffs also argue that Defendants wrongfully seized and/or disseminated their confidential banking records in violation of the Fourth Amendment. (Id. ¶ 234.) Specifically, Plaintiffs allege that Windsor "supplied attorney Stan Case with a complete file of documents and banking transactions Windsor had improperly obtained and requested Case sue CIF, Field and Kelley and participate in a conspiracy to injure the

plaintiffs." (Id. ¶ 170.) Plaintiffs provide no further evidence to support these allegations. Therefore, the court finds that Plaintiffs have asserted no constitutional violation on behalf of Windsor.

d. Logan

Logan is also an investigator with the Office. (Defs. Mem. Supp. Summ. J. Ex. 12 (Logan Aff. ¶ 2).) Logan investigates "cases in which allegations of securities fraud are present that might lead to the filing of criminal charges. [His] duties also include other duties related to the prosecution of criminal charges, or duties that are in aid of the investigation and prosecution of criminal charges." (Id. Ex. 12 (Logan Aff. ¶ 3).) Defendants allege that Logan "has had very limited involvement with the Plaintiffs. He has investigated some of the activities of the Plaintiffs." (Id. at 14.) Plaintiffs argue that Logan is not entitled to prosecutorial immunity. (Field Objections 13.) For the reasons stated above regarding Windsor, the court finds that Logan is not entitled to prosecutorial immunity. However, Logan is entitled to qualified immunity. Plaintiffs allege that Logan acted outside the scope of his investigatory authority by (1) harassing "numerous family members, business associates, Church officers, and acquaintances of Field and/or Kelly"; (2) participating in an online chat room or blog "encouraging the Note Holders of CIF to sue [Plaintiffs]; (3) attempting to persuade one or more civil suits against Plantiffs' attorneys; (4) contacting judges to submit false affidavits; (5) illegally obtaining bank records; (6) threatening "attorney Stan Case with a law suit from all of the Note Holders if he did not cooperate with [him]"; (7)

publishing false information to the Greenville News; interfering with settlement negotiations; and (8) failing to withdraw the Notices of Intent to Seek Stop Orders. (Compl. ¶¶ 180-81, 188-89, 190, 201, 217, 218, 263.)

However, Plaintiffs have failed to support the allegations that Logan violated their constitutional rights. Plaintiffs provide no information to support their allegation that Logan illegally obtained bank records during his investigation nor do they provide any evidence, outside of mere allegations, to establish any violation of other constitutional or statutory rights. As such, the court finds that Plaintiffs have failed to assert a constitutional violation on behalf of Logan.

e. Jordan

Jordan is also an investigator for the Office. (Defs. Mem. Supp. Summ. J. Ex. 12 (Jordan Aff. ¶ 3).) Jordan investigates "cases in which allegations of securities fraud are made. The investigations that [he] conduct[s] may lead to the filing of criminal charges. [His] duties also include other duties related to the prosecution of criminal charges, or duties that are in aid of the investigation and prosecution of criminal charges." (Id. Ex. 14 (Jordan Aff. ¶ 3).) Plaintiffs argue that Jordan is not entitled to prosecutorial immunity. (Field Objections 13.) For the reasons stated above regarding Windsor, the court finds that Logan is not entitled to prosecutorial

immunity. Further, Jordan acknowledges that "prosecution decisions are beyond the scope of [his] duties." (Defs. Mem. Supp. Summ. J. Ex. 14 (Jordan

Aff. ¶ 4(b)).) Jordan is, however, entitled to qualified immunity for the same reasons as Windsor and Logan.

Plaintiffs have failed to allege a constitutional violation as to Jordan. Plaintiffs allege that Jordan (1) wrongfully interfered with civil actions against CIF because he "telephoned Field's ex-wife" telling her that Field was going to be prosecuted for false advertising and securities fraud, (2) harassed family members and acquaintances of Field and/or Kelley, (3) participated in chat room or blog conversations regarding Plaintiffs, (4) "demand[ed] information and

Documents...which he knew were barred to the Attorney General as having been under seal and/or the subject of pending protective orders," (5) intentionally caus[ed] Taillon severe emotional distress, illegally obtain[ed] bank records, (6) threatened "attorney Stan Case with a law suit from all of the Note Holders if he did not cooperate with" him, (7) published false information to the Greenville News, (8) interfered with settlement negotiations, and (9) continued to serve "bad subpoenae," among other things. (Compl. ¶¶ 173, 179-81, 186-87,190, 201, 217-18, 220.)

Plaintiffs have failed to allege that Jordan has violated their constitutional rights. Plaintiffs provide no information to support their allegation that Jordan illegally obtained bank records during his investigation nor do they provide any evidence, outside of mere allegations, to establish any other violation of constitutional or statutory rights. Therefore, the court finds that Plaintiffs have failed to assert a constitutional violation by Jordan.

f. Evans

Evans was a prosecutor with the Office. (Defs. Mem. Supp. Summ. J. 8.) Evans died on June 20, 2009. (Id.) The evidence in the record does not detail the scope of Evans' involvement with CIF or any other Plaintiffs. N.5. The complaint was filed after Evans' death, therefore the court is without an affidavit detailing her involvement. As a result, the court is unable to determine whether Evans is entitled to prosecutorial immunity. However, Evans is entitled to qualified immunity.

Plaintiffs allege that Evans (1) "telephoned Judge Few directly and engaged in forbidden ex parte conversations with him...[knowing] such phone conversations violate...Rules of Professional Conduct," (2) "submitted an affidavit of [Jordan] to the Court and requested on an ex parte basis the Court 'freeze' all funds in the names of Arthur Field, Kathryn Taillon, Davyd Field and Allyson Field," (3) requested the court to compel Field and his family to appear on June 17, 2009, to give evidence to the State Law Enforcement Division and to provide evidence. N6. to the Court, in violation of the Fifth Amendment, (4) threatened "attorney Stan Case with a law suit from all of the Note Holders if he did not cooperate with" her and other Defendants, (5) wrongfully and intentionally provided copies of Suspicious Activity Reports "in violation of federal law," (6) deliberately violated the Rules of Court and the Canons of Ethics and the Rules of Professional Conduct, (7) coerced an attorney to notarize Jordan's affidavit in Jordan's absence, and (8) published false

information to the Greenville News. Note 6 (Compl. ¶¶ 188-89, 194, 201, 204-05, 207, 217.)

Plaintiffs have failed to allege that Evans violated their constitutional rights. Plaintiffs provide no further evidence aside from their allegations. Consequently, the court finds that Plaintiffs have failed to assert a constitutional violation by Evans

2. Injunctive Relief

Plaintiffs allege that "any threatened or actual criminal investigation and/or prosecution of Field, Taillon and/or Kelley must be immediately and permanently enjoined." (Compl. ¶ 333.) Further, Plaintiffs seek "to enjoin defendants and the State of South Carolina Office of the Attorney General to conform it and their future conduct to the requirements of federal law and to stay all future prosecution of Field, Taillon, Kelley and other persons connected with them or CIF." (Id. Request for Relief.) In addition, Plaintiffs request "temporary and permanent injunctive relief preventing the Attorney General of South Carolina and/or its State Grand Jury from issuing an indictment against [Plaintiffs] pursuing further criminal and/or civil and/or administrative investigations." (Id.)

Defendants argue that the magistrate judge erred by not recommending that summary judgment be granted as to Plaintiffs' claims for injunctive relief. (Defs. Objections, generally.); (Condon Objections, generally.) As to Condon and Evans, the court agrees with Defendants. Condon is no longer employed by the Office and therefore is no longer in the position to bring suit against Plaintiffs as an Assistant Attorney

General. Similarly, Evans is deceased and unable to act against or prosecute Plaintiffs. As such, the court grants Condon and Evans summary judgment as to Plaintiffs' claims for injunctive relief.

The Securities and Exchange Commission ("SEC") is "the federal administrative agency entrusted with the duty and power to regulate and control transaction in securities." *Ayers v. SEC*, 482 F. Supp. 747, 749 (D. Mont. 1980). In the case at bar, the Division is a state agency with the power to regulate securities. Although the investigation in this case was undertaken by the Division pursuant to S.C. Code Ann. § 35-1-101 et seq., the case law interpreting the powers of the SEC is persuasive. Cases have noted that "while . . . the SEC must have great latitude and freedom from undue judicial interference in conducting agency investigations, the agency discretion is not unfettered." Id. at 751. Some courts have found that the court can enjoin "SEC

Investigations...predicated on allegations to the effect that the SEC has plainly exceeded its statutory authority or threatens irreparable injury in clear violation of an individual's rights." Id. at 751-52 (internal quotation marks omitted).

> However, [t]he Commission's power to investigate . . . extends sweepingly to the exploration of 'any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of the provisions of [the Securities Exchange Act], in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further

> legislation concerning the matters to which . . . (the Act) relates.' It is absurd to say that the Commission may not employ this power to delve further into matters it has encountered in the course of its duties. One of the more elementary reasons for creating such agencies is precisely their ability to accumulate knowledge and 'to draw upon the entirety of their specialized experience. It makes no difference that plaintiffs choose to believe the Commission is bent ultimately upon punishing them.

Thomson & McKinnon v. SEC, 268 F. Supp. 11, 14-15 (D.C.N.Y. 1967).

Similarly, in the instant case, the court recognizes that Defendants' authority and discretion to investigate Plaintiffs is not unfettered.

On July 22, 2009, Plaintiffs Field and Taillon filed a motion for a temporary restraining order or a temporary injunction. Plaintiffs sought relief restraining Defendants from issuing further threats of prosecution against Plaintiffs and pursuing further investigation of the Plaintiffs in relation to the activities of CIF. (Mot. TRO 2.) The court denied Plaintiffs' motion. "[W]hen a genuine threat of prosecution exists, a litigant is entitled to resort to a federal forum to seek redress for an alleged deprivation of federal rights." *Wooley v. Maynard*, 430 U.S. 708, 710 (1977). However, "a federal court should not enjoin threatened prosecutions except when necessary to prevent irreparable harm which is great and immediate." *Bykofsky v. Borough of Middletown*, 389 F. Supp. 836, 844 (M.D. Pa. 1975).

In the Order denying the motion for a temporary restraining order, the court explained that the burden of litigation not brought in bad faith is not an irreparable injury and held that Plaintiffs were unable to establish an irreparable injury. (Sept. 24, 2009 Order.) Similarly, Plaintiffs' complaint fails to establish any irreparable harm. Aside from Plaintiffs' conclusory allegations, there is no evidence that Defendants lacked a good faith basis for pursuing an investigation. Plaintiffs' belief that Defendants are "bent" on punishing them is insufficient. See *Thomson*, 268 F. Supp. at 14-15.

Therefore, the court grants the remaining Defendants summary judgment as to Plaintiffs' claims for injunctive relief. Based on the foregoing, the court grants Defendants' motions for summary judgment and adopts the magistrate judge's Report and Recommendation to the extent that it is consistent with this Order.

It is therefore

ORDERED that Defendants' motion for summary judgment, docket number 110, is

granted; it is further

ORDERED that Condon's motion for summary judgment, docket number 113, is

granted; it is further

ORDERED that Field's motion for reconsideration, docket number 146, is denied as

moot; and it is further

ORDERED that Field and Taillon's appeal of the magistrate judge's denial of the motion

for reconsideration of the order granting Defendants' motion to stay discovery and denying Field

and Taillon's motion for limited discovery, docket number 169, is denied as moot.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.

Senior United States District Judge

Greenville, South Carolina

August 16, 2010

Note 1· The recommendation has no presumptive weight, and the responsibility for making a final determination remains with the United States District Court. See *Mathews v. Weber*, 423 U S.261,270(1976). The court is charged with making a de novo determination of those portions of the Report and Recommendation to which specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the magistrate judge or recommit the matter with instructions. 28 U S.C. 636(b)(1).

Note 2: While Plaintiffs filed multiple objections each of which raised numerous objections, each objection contests the rationale behind the matigstrate judge's conclusion that Defendants were immune from suit by prosecutorial immunity.

Note 3· Condon is no longer employed by the Attorney General's Office. (Condon Objections 1) Evans is deceased. (Defs. Mem.Supp. Summ.J.8.)

Note 4: The Notice is signed by Tracy A Meyers, an Assistant Attorney General, who has not been named as a Defendant. (Defs. Mem. Supp Summ. J. Ex. 11 (Notice).)

Note 5: For instance, Defendants allege that Evans participated 5 in private civil proceedings against CIF, yet they do not explain the extent or scope of Evans' participation. (Defs. Mem.Supp. Summ. J. 9.)

Note 6: The complaint does not state with certainty that Evans performed many of the acts. Instead the complaint states that Evans "and/or" another Defendant performed most allegations. See (Compl. ¶¶ 188-89, 192, 197, 217).

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION
Civil Action No.: 6-09-1949-HMH-BHH

Arthur M. Field, Ph.D.; Kathryn Taillon;
T. Bart Kelley; and
Capital Investment Funding, LLC.
Plaintiffs,

v.

Henry D. McMaster, Individually, and as Securities Commissioner of SC; *et alia*,
Defendants.

This matter is before the Court on the plaintiff's motion for limited discovery [Doc. 117] and the defendants' motion to stay all discovery [Doc 111]. The defendants also have separate motions for summary judgment pending, based exclusively on various absolute and qualified immunity defenses. [Docs. 110, 113.]

The importance of resolving "immunity questions at the earliest possible stage in litigation is well settled. *Pearson v. Callahan,* --- U.S. ---, 129 S.Ct. 808, 815(2009)(quotation omitted). Moreover, it is routinely observed that "until this threshold immunity question is resolved, discovery should not be allowed." *Harlow v. Fitzgerald*, 457 U.S. 800,818 (1982); see also *H.H. ex rel. H.F. v. Moffett,* 335 Fed. Appx.306,312 (4th Cir. 2009). The United States Supreme Court has made clear that the "driving

force" behind creation of the qualified immunity doctrine was a desire to ensure that "insubstantial claims' [sic] against government officials [will] be resolved prior to discovery." *Anderson v. Creighton,* 483 U.S. 635,640, n.2(1987). "One of the purposes of the...qualified immunity standard is to protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government." *Anderson v. Creighton,* 483 U.S. 635,646, n.6(1987) (quoting *Harlow*, 457 U.S. at 817). Denial of discovery is appropriate even though the defendants have filed a motion for summary judgment. In fact, that is precisely what the Supreme Court has contemplated. See *id.* At 640 n.2; see also *Lescs v. Martinsburg Police Department*, 138 Fed. Appx. 562, 564 (4th Cir. 2005); *Demello v. Ney*, 1999 WL 362906 at *2 (9th Cir. May 28, 1999); *Lewis v. City of Ft. Collins*, 903 F.2d 752, 758 (10th Cir. 1990).

Accordingly, the Court will not allow any discovery at this time and will stay the same.

Based on the foregoing, the plaintiff's motion for limited discovery [Doc. 117] is DENIED and the defendants' motion to stay all discovery [Doc. 111] is GRANTED.

IT IS SO ORDERED.

/s/ Bruce H. Hendricks

United States Magistrate Judge

June 22, 2010

Greenville, South Carolina

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Arthur M. Field, Ph.D. et al.
Plaintiffs,
vs.
Henry McMaster, et al.
Civil Action No.: 6:09-1949-HMH-BHH

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

This matter is before the Court on the defendant Condon's and defendant Windsor,Jordan, Evans, McMaster, and Logan's respective motions for summary judgment [Doc.110, 113] pursuant to Federal Rule of Civil Procedure 56. The plaintiffs have pled various federal and state law claims for money damages, as well as for declaratory and injunctive relief. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(A), and Local Rule 73.02(B)(2)(e), D.S.C., all pretrial matters in cases involving *pro se* litigants are referred to a United States Magistrate Judge for consideration.

BACKGROUND (note 1)

The plaintiffs in this *pro se* action are principals of Capital Investment Funding, LLC, as well as the corporation itself. The plaintiff Field is a licensed attorney in Connecticut and New Jersey, although not in South Carolina. The individual plaintiffs formed the corporation Capital Investment Funding,

LLC (CIF), in 1999. The defendants contend that CIF was created in order to borrow money from South Carolina residents by issuing securities in the form of promissory notes and to lend that money to Lancaster Resources, Inc. (LRI), CIF's parent company. On January 15, 2008, as alleged in the Complaint, the officers or members of CIF voted to begin the process of winding up the company. (Compl. ¶ 149.) It appears that as a result of this decision, beginning in the early months of 2008, a number of CIF's investors filed suit against CIF, Field, the other plaintiffs in the present case, and others, seeking to protect or recover their investments. (See Defs. Ex. 2.)(note 2) The plaintiffs in the state cases alleged a breach of contract, sought an accounting and the attachment of the property of CIF and Field, and sought the appointment of a receiver. *Id.* Prior to those lawsuits, on May 11, 2007, the Securities Division of the South Carolina Attorney General's office had issued a Notice of Intent to Seek a Stop Order. (Defs. Ex. 11.) That filing was based upon the Division's concerns over inaccuracies and fraud contained in certain registration statements of CIF. *Id.* The plaintiffs' claims relate to actions of prosecutors and investigators of the Securities Division and the Attorney General's office in the prosecution of this Notice and putative criminal charges. The plaintiffs' complaints are voluminous. (See generally Compl.; Field Aff.) In short, the plaintiffs contend that defendant Condon wrongfully denied CIF's registration (Field Aff. ¶ 102); the Notice of Intent was fraudulent and retaliatory, *id.* ¶ 104-05; the Notice of Intent and subsequent proceedings caused damage to CIF's public reputation, *id.* ¶¶ 111-13;

that the defendants have continually and maliciously harassed the plaintiffs through wrongful subpoenas and interviews, *id.* ¶¶ 172-73; the plaintiffs colluded with attorneys to sue CIF civilly, *id.* ¶ 186; and subsequently interfered with the settlement of such lawsuits to wrongfully and improperly delay repayment of CIF's NoteHolders, *id.*

APPLICABLE LAW
LIBERAL CONSTRUCTION OF *PRO SE* COMPLAINT AND PLEADINGS

The plaintiffs brought this action *pro se*. This fact requires that their pleadings be accorded liberal construction. *Estelle v. Gamble*, 429 U.S.97 (1976); *Haines v. Kerner*, 404U.S. 519 (1972); *Loe v. Armistead*, 582 F.2d 1291 (4th Cir.1978); *Gordon v. Leeke*, 574F.2d 1147 (4th 1978). *Pro se* pleadings are held to a less stringent standard than those drafted by attorneys. *Hughes v. Rowe*, 449 U.S. 5 (1980) (per curiam). Even under this less stringent standard, however, the *pro se* Complaint is still subject to summary dismissal. The mandated liberal construction means only that if the court can reasonably read the pleadings to state a valid claim on which the petitioner could prevail, it should do so. *Barnett v. Hargett*, 174 F.3d 1128 (10th Cir.1999) A court may not construct the plaintiff's legal arguments for her. *Small v. Endicott*, 998 F.2d 411 (7th Cir.1993). Nor should a court "conjure up questions never squarely presented." *Beaudett v. City of Hampton*, 775 F.2d1274, 1278 (4th Cir.1985).

SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) states, as to a party who has moved for

summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Accordingly, to prevail on a motion for summary judgment, the movant must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) that he is entitled to judgment as a matter of law. As to the first of these determinations, a fact is deemed "material" if proof of its existence or non-existence would affect disposition of the case under applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating
to the district court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings. Rather, the non-moving party must demonstrate that specific, material facts exist which give rise to a genuine issue. *Id.* at 324. Under this standard, the existence

of a mere scintilla of evidence in support of the plaintiff's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252.

Likewise, conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. Furthermore, Rule 56(e) provides in pertinent part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. Fed. R. Civ. P. 56(e). Accordingly, when Rule 56(e) has shifted the burden of proof to the non-movant, he must produce existence of every element essential to his action that he bears the burden of adducing at a trial on the merits.

DISCUSSION

As an initial matter, the Court has disallowed any discovery in this case [Doc. 141], in order to consider, at the earliest possible stage, the applicability of certain immunities which are designed, in part, to avoid for government officials the expense and

burden of the same. *See Pearson v. Callahan*, --- U.S. ----, 129 S.Ct. 808, 815 (2009). The Court, therefore, is hesitant to consider any arguments of the defense which stray into areas better considered after discovery is taken or otherwise unrelated to any immunity defense. The Court will be conservative in this regard.

Prosecutorial and qualified immunities, however, are defenses rightly considered on a motion for summary judgment even prior to formal discovery. *See Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987); *Lescs v. Martinsburg Police Department*, 138 Fed. Appx. 562, 564 (4th Cir. 2005); *Demello v. Ney*, 1999 WL 362906, at *2 (9th Cir May 28, 1999); *Lewis v. City of Ft. Collins*, 903 F.2d 752, 758 (10th Cir. 1990). In response to a summary judgment motion based on such immunity defenses, a plaintiff's 56(f) affidavit must demonstrate a "connection between the information he would seek in discovery and the validity of the [defendant's] . . . immunity assertion." *Lewis v. City of Ft. Collins*, 903 F.2d 752, 758 (10th Cir. 1990) (citations omitted).

I. Prosecutorial Immunity

The defendants first contend that they have prosecutorial immunity against any claim for money damages by the plaintiffs. *See Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); Lyles, 79 F.3d at 377. A prosecutor is absolutely immune from actions taken in the prosecutorial decision-making process in initiating or continuing a criminal prosecution. *See id.* at 431; *see also Springmen v. Williams*, 122 F.3d 211, 213 (4th Cir.1997). When prosecutors perform advocative functions that are "intimately associated with the judicial phase of the

criminal process," they are absolutely immune from civil suit. *Imbler*, 424 U.S. at 430. Prosecutors, therefore, are cloaked with absolute immunity once judicial proceedings against an individual have commenced. *See Goldstein v. Moatz*, 364 F.3d 205, 213-14 (4th Cir.2004) (distinguishing a prosecutor's investigative function, which does not trigger absolute immunity, as opposed to acting as an advocate, during which absolute immunity would apply). The touchstone is advocacy. *Id.* at 213-14. Where duties performed are merely investigatory or administrative the operative immunity should be a qualified rather than an absolute one. *See id.* Absolute immunity extends to "persons working under [a prosecutor's] direction, when they function as advocates for the state" and are clearly associated with the judicial process. *Bernard v. County of Suffolk*, 356 F.3d 495, 502 (2d Cir. 2004).

Emphasizing the Fourth Circuit's decision in *Goldstein*, the plaintiffs have countered that application of the prosecutorial immunity should be made "sparingly," *Goldstien*, 364 F.3d at 212, and that it should not be recognized as a shield against liability for conduct performed prior to a probable cause determination. *Id.* at 215-16. The Court will consider each defendant, in turn, to determine whether or not their conduct can rightly be characterized as advocacy or investigation.

A. Defendants Condon and McMaster

At all times relevant to this case, defendant Condon was an Assistant Attorney General in the South Carolina Securities Division (Condon Aff. ¶ 1) and defendant McMaster was the Securities

Commissioner of South Carolina (McMaster Aff. ¶ 2).3 It is undisputed that, on May 11, 2007,4 the Securities Division filed a Notice of Intent to Seek a Stop Order pursuant to S.C. Code §§ 35-1-306(a)(stop orders), 35-1-306(e)(notices regarding same). (Compl. ¶ 100; Field Aff. ¶¶ 104-05.) Among other bases, Section 35-1- 306 provides that a stop order "may issue" upon a finding that an entity's registration statement contains "false or misleading" information or its offering otherwise works "a fraud upon purchasers." S.C. Code §§ 35-1-306(a). The May 11 Notice was expressly predicated on the Securities Division's determination that CIF's registration statement was "incomplete, false, misleading, and tends to work a fraud upon purchasers . . . ." (Def. Ex. 11.) The Notice indicated the Securities Division's intent to seek the issuance of a Stop Order and revocation of any exemption under which CIF was offering securities. *Id.* The Notice itself was not an actual Stop Order. *See id.*

The Court believes that this act of the Securities Division converted its efforts from investigatory to adversarial and, therefore, necessarily advocative. First, "[p]rosecutors have absolute immunity when they are performing prosecutorial duties . . . even if it is a complaint charging a *civil* rather than a criminal violation." *Thomas v. City of Peoria*, 580 F.3d 633, 638 (7th Cir. 2009) (emphasis added); *see also Smith v. Power*, 346 F.3d 740, 742 (7th Cir.2003); *Skinner v. Govorchin*, 463 F.3d 518 (6th Cir. 2006). Although in an unpublished opinion, this district has specifically agreed that agency officials, who perform functions analogous to those of a prosecutor in initiating and pursuing *civil and*

administrative enforcement proceedings are entitled to prosecutorial immunity. *We, the People, Sakima Iban Salih El Bey, Preamble Citizen of the United States Gov't, Nat. of the U.S. v. McMaster*, 2008 WL 1849800, at *6 (D.S.C. April 24, 2008) (citing *Pfeiffer v. Hartford Fire Ins.Co.*, 929 F.2d 1484, 1489 (10th Cir.1991)). Accordingly, to the extent the Stop Order proceedings were civil or administrative in nature it is no bar to the applicability of prosecutorial immunity. The plaintiffs have not argued otherwise.

Second, the Court does not interpret the Fourth Circuit's discussion of probable cause, in *Goldstein*, as disqualifying defendants Condon and McMaster, from the immunity's protection. Specifically, the determination of the Securities Division that grounds for a Stop Order existed, such that the proceedings could be initiated, was sufficient. *See Goldstein*, 364 F.3d at 215-16. As a result of its independent determination that a Stop Order was justified, it filed a Notice of Intent to Seek a Stop Order. (Defs. Ex. 11.) This is comparable to the discretionary determination made by criminal prosecutors when they believe probable cause exists to pursue a criminal case. *See Goldstein*, 364 F.3d at 215-16; *Sakima Iban Salih*, 2008 WL 1849800, at *6. It is well-established that the filing of a complaint or otherwise initiating a civil enforcement proceeding is, in fact, a "prosecutorial" duty. *Smith*, 346 F.3d at 742 (7th Cir.2003); *We, the People, Sakima Iban Salih*, 2008 WL 1849800, at *6. Moreover, the proposition "that officials do not enjoy absolute immunity for acts committed prior to a probable cause determination (i.e., during investigation) – flows logically from the Supreme Court's declarations that the purpose of absolute immunity is to *protect*

the exercise of discretion by key government officials." *See Goldstein*, 364 F.3d at 215-16 (emphasis added). "Once a prosecutor possesses probable cause, he must decide *whether to prosecute, which charges to initiate*, what trial strategy to pursue, and a multitude of other important issues that require him to exercise discretion." *Id.* (emphasis added). "In a pre-probable-cause investigation, on the other hand, a prosecutor exercises no more discretion than a police officer and thus should enjoy no more protection than qualified immunity." *Id.*

Similar to a post-probable-cause determination, the Notice filed constituted the Securities Division's exercise of its discretion to seek a Stop Order based on its finding that fraud was present in a registration statement and/or offering of CIF. (See Defs. Ex. 11.) In other words, they initiated a proceeding against CIF. It is precisely the exercise of this kind of discretion, which prosecutorial immunity is designed to guard. *See id.* Accordingly, acts subsequent to the May 2007 filing would seem to be prosecutorial rather than merely investigatory, because they were performed pursuant to a live adversarial proceeding and in defendant Condon's and McMaster's roles as advocates of the State, respectively.

B. Other defendants

All of the other defendants are either investigators or prosecutors with the Securities
Division or the Attorney General's office, who worked at the direction of defendants Condon and McMaster. (Logan Aff. ¶ 2; Windsor Aff. ¶ 2; Jordan Aff. ¶ 2; Doc. 110-1 at 8.) As stated, *infra* note 1, the

Securities Division is part of the Attorney General's office. (See McMaster ¶ 2, Condon Aff. ¶ 1); In the Court's view, the Notice of Intent,
filed May 11, 2007, put the entire office of the Attorney General in an advocates role against CIF, as a matter of law, even if additional investigations were pursued by other Divisions of the Attorney General's office, subsequent to that date. Critically, absolute immunity extends to "persons working under [a prosecutor's] direction, when they function as advocates for the state" and are clearly associated with the judicial process. *Bernard v. County of Suffolk*, 356 F.3d 495, 502 (2d Cir.2004); *Howell v. Gustafson*, 2010 WL 2026674 (D.S.C. 2010). This is equally true of investigators, like some of the defendants here. *See We, the People, Sakima Iban Salih*, 2008 WL 1849800, at *6. All defendants, therefore, enjoy the protection cast by Condon and McMaster's immunity shield raised in the discretionary and prosecutorial act of filing the Notice, about which the plaintiffs substantially complain. (Note 5) The Court's recommendation as to prosecutorial immunity would bar all of the plaintiff's federal and state law claims for money damages, which should be dismissed with prejudice. *See Williams v. Condon*, 553 S.E.2d 496 (S.C. Ct. App. 2001) (prosecutorial immunity). The plaintiff's claims for equitable relief, however, will be separately discussed below.

II. Injunctive and Declaratory Relief

The Court's recommendation as to prosecutorial immunity only affects the availability
of money damages against the defendants and does not protect them from the injunctive and/or

declaratory relief sought by the plaintiffs. *See Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 736-37 (1980) (citing *Gerstein v. Pugh*, 420 U.S. 103 (1975)). against "all future prosecution" and a declaration that "S.C.C.A. 1-7-115 and Title 35 Chapter 1" are unconstitutional. (Compl. at 55.)(Note 6).

Defendants correctly note that a federal court may not award injunctive relief that would affect pending state criminal proceedings absent extraordinary circumstances. *See Bieber v. South Carolina Com'n on Lawyer Conduct*, 2008 WL 4442629 (D.S.C. September 24, 2008) (Herlong, J.). In *Younger v. Harris*, 401 U.S. 37, 43-44 (1971) the United States Supreme Court held that a federal court should not equitably interfere with state criminal proceedings "except in the most narrow and extraordinary of circumstances." *Gilliam v. Foster*, 75 F.3d 881, 903 (4th Cir.1996). The *Younger* Court noted that courts of equity should not act unless the moving party has no adequate remedy at law and will suffer irreparable injury if denied equitable relief. *Younger*, 401 U.S. at 43-44. Pursuant to *Younger* and its progeny, a district court is required to abstain from interfering in state proceedings, even if jurisdiction exists, where (1) there are ongoing state judicial proceedings; (2) the proceedings implicates important, substantial, or vital state interests; and (3) there is an adequate opportunity to raise federal claims in the state proceedings. *Nivens v. Gilchrist*, 444 F.3d 237, 241 (4th Cir. 2006); *Martin Marietta Corp. v. Maryland Comm'n on Human Relations*, 38 F.3d 1392, 1396 (4th Cir.1994) (citing *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)).

The defendants emphasize that the plaintiffs have an adequate opportunity to raise their federal claims in the state proceedings. The plaintiffs have made no response whatsoever concerning the *Younger* doctrine, specifically, or abstention, generally, as far as the Court can tell. The Court, however, believes that *Younger* is inapplicable here insofar as there is no ongoing state judicial proceeding about which the plaintiffs complain. *See Nivens*, 444 F.3d at 241.

It appears that most jurisdictions agree that "[t]he possibility of future prosecutions, however – even the likelihood of future prosecutions – is not sufficient to justify *Younger* abstention." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1242 (10th Cir. 2001). Insofar as the plaintiffs seek an injunction against prosecutions which have not yet been instituted, *Younger* is, therefore, inapposite. (Note 7) The Court does not believe that the defendants have advanced any other arguments, which might be appropriately considered prior to discovery, which would recommend dismissal of claims for injunctive relief. As the defendants note, the Court has already found doubtful the plaintiff's claims in this regard. [See Docs. 16, 30.] But prior to discovery, the Court believes any further determination as a matter of law would be improvident. Although the Court has doubted the plaintiff's ability to establish irreparable harm, it is not impossible that they might do so in discovery.

III. Other Defenses

To the extent prosecutorial immunity does not operate as a complete shield for some or all of the defendants or some or all of the claims, the defendants also suggest that the plaintiff's state law

claims should be dismissed because the South Carolina Tort Claims Act ("SCTCA") is the "exclusive remedy for any tort committed by an employee of a governmental entity." *Flateau v. Harrelson*, 355 S.C. 197, 203, 584 S.E.2d 413 (Ct. App. 2003) (citing S.C. Code Ann. § 15-78-70(a)). The defendants, however, recognize that the SCTCA does not insulate a government employee from liability arising out of conduct outside the scope of official duties or "actual fraud, actual malice, intent to harm, or a crime involving moral turpitude . . . ." S.C. Code § 15-78-70(b). Moreover, the defendants concede that the plaintiffs have alleged that the defendants acted outside the scope of their duties and with malice. [Doc. 110-1 at 22.] The defendants argue, however, that these are unsubstantiated and self-serving allegations of the plaintiffs. The Court would agree that bald-faced allegations are normally insufficient to survive summary judgment. *See* Fed. R. Civ. P. 56(e). But, as stated, no discovery has been taken in this case; the Court will not recommend dismissal for a failure to produce evidence where no opportunity has been afforded to secure it. For this same reason, the defendants' various substantive arguments as to themerits of the plaintiffs' state law claims will not be entertained. To the extent the defendants believe that the plaintiff's have failed to sufficiently plead facts, which if proven would establish such causes, the Court would disagree. The averments in the Complaint are more than sufficient to survive a 12(b)(6) argument. It is voluminous and substantially specific.

CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, the Court recommends that the defendants' respective motions for summary judgment be [Doc. 110, 113] be GRANTED, in part, and DENIED, in part. Specifically, the plaintiffs' federal and state law claims should be dismissed with prejudice to the extent they seek money damages or declaratory relief. In regards to the plaintiffs' claims for injunctive relief, the motions should be DENIED.

IT IS SO RECOMMENDED.

s/Bruce H. Hendricks
United States Magistrate Judge
June 30, 2010
Greenville, South Carolina

Note 1: There has been no discovery in this case. Some of the following facts are established in the record but others are representations of the parties. The undersigned has not relied on any fact in its determination, which is either unsupported or otherwise contested as between the parties.

Note 2: Exhibits to the motion of the multiple defendants [Doc. 110] will be cited as "Defs Ex." Exhibits to defendant Condon's motion [Doc. 113] will be cited as "Condon Ex."

Note 3: In South Carolina, the Attorney General is the Securities Commissioner and his office includes the State's Securities Division. (See McMaster ¶ 2, Condon Aff. ¶ 1).

Note 4: The prosecutorial efforts for which the plaintiffs seek to recover and enjoin have all arisen subsequent to this date. To the extent the filing of this Notice constituted the beginning of the formal prosecution and advocacy against CIF, all subsequent acts would be covered by an absolute immunity, as having been prosecutorial rather than investigative in nature.

Note 5: This conclusion renders the qualified immunity analysis unnecessary. The defendants have encouraged the Court in this regard. [See Doc. 130 at 4.]

Note 6 The plaintiffs ask the Court to enter a permanent injunction. The plaintiffs have not made any rejoinder regarding the defendants' contention that the plaintiffs' request for declaratory relief is now moot. [Doc. 110 at 23-24.] The Court, therefore, considers it abandoned or, in the alternative, that the plaintiffs have failed to overcome the legal contentions of the defendants in that respect. To the extent the district court disagrees that the matter has not been abandoned, the undersigned would recommend that the motion for summary judgment be denied as to the declaratory relief claim and that further briefing be requested concerning any charge of unconstitutionality by the plaintiffs Some discovery may also be appropriate in this regard.

Note 7· The Court does not believe this determination is 7 at odds with its reasoning concerning prosecutorial immunity. To the undersigned, that analysis turned on whether the individual defendants were exercising a kind of prosecutorial discretion to initiate agency proceedings and subsequent acts. While *Younger* likely applies to administrative proceedings, *New Orleans Public Service, Inc. v. Council of City*, 491 U.S. 350, 370 & n 4 (1989), it does not appear that any were formally pending at the time this lawsuit was filed and the plaintiffs have expressly asked for relief from *future* prosecutions, which are necessarily not yet pending In other words, the state activity was sufficient to implicate immunity but involved something less than what *Younger* demands. Again, this is true particularly in light of the way the plaintiffs, themselves, have framed the relief.

Rehearing En Banc Denied

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 10-1957 (6:09-cv-01949-HMH)

ARTHUR M. FIELD, PhD.; KATHRYN TAILLON; T. BART KELLEY Plaintiffs - Appellants and CAPITAL INVESTMENT FUNDING LLC, Jerry T. Saad, Receiver for Capital Investment Funding LLC Plaintiff v. HENRY D. MCMASTER, Individually and as Securities Commissioner of South Carolina; WILLIAM JOSEPH CONDON, JR., Individually and as Assistant Securities Commissioner; TOMMY WINDSOR, Individually and as Securities Investigator; JOE F. JORDAN, JR., Individually and as an Investigator of the Attorney General; JENNIFER EVANS, as personal representative; LANSING LOGAN, Individually and as a Special Investigator of the Attorney General; OFFICE OF THE ATTORNEY GENERAL, State of South Carolina Defendants - Appellees

ORDER

The petition for rehearing en banc was circulated to the full Court. No judge requested a poll under Fed. R. App. P. 35. The Court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk Nov. 29, 2010

Full Text of Relevant Statutes

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C § 1985(3)

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election

of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1986

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of

the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

12 U.S.C. § 3402(2)

Except as provided by section 3403 (c) or (d), 3413, or 3414 of this title, no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described and—

(2) such financial records are disclosed in response to an administrative subpoena or summons which meets the requirements of section 3405 of this title;

12 U.S.C. § 3405

A Government authority may obtain financial records under section 3402 (2) of this title pursuant to an administrative subpena or summons otherwise authorized by law only if—

(1) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry;

(2) a copy of the subpoena or summons has been served upon the customer or mailed to his last known address on or before the date on which the subpoena or summons was served on the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry:

"Records or information concerning your transactions held by the financial institution named in the attached subpoena or summons are being sought by

this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.] for the following purpose: If you desire that such records or information not be made available, you must:

"1. Fill out the accompanying motion paper and sworn statement or write one of your own, stating that you are the customer whose records are being requested by the Government and either giving the reasons you believe that the records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records.

"2. File the motion and statement by mailing or delivering them to the clerk of any one of the following United States district courts:

"3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to

"4. Be prepared to come to court and present your position in further detail.

"5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.

If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein will be made available. These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer."; and

(3) ten days have expired from the date of service of the notice or fourteen days have expired from the date of mailing the notice to the customer and within

such time period the customer has not filed a sworn statement and motion to quash in an appropriate court, or the customer challenge provisions of section 3410 of this title have been complied with.

12 C.F.R.353(a) and (g)

(a) *Suspicious activity reports required.* A bank shall file a suspicious activity report with the appropriate federal law enforcement agencies and the Department of the Treasury, in accordance with the form's instructions, by sending a completed suspicious activity report to FinCEN in the following circumstances:...

(g) *Confidentiality of suspicious activity reports.* Suspicious activity reports are confidential. Any bank subpoenaed or otherwise requested to disclose a suspicious activity report or the information contained in a suspicious activity report shall decline to produce the suspicious activity report or to provide any information that would disclose that a suspicious activity report has been prepared or filed citing this part, applicable law (e.g., 31 U.S.C. 5318(g)), or both, and notify the appropriate FDIC regional office (Division of Supervision).

S.C.C.A.14-7-1720

SECTION 14-7-1720. Proceedings to be secret; juror not to disclose; persons entitled to attend grand jury session; persons attending not to disclose; exceptions, penalties.

(A) State grand jury proceedings are secret, and a state grand juror shall not disclose the nature or substance of the deliberations or vote of the state grand jury. The only persons who may be present in the state grand jury room when a state grand jury is in session, except for deliberations and voting, are the state grand jurors, the Attorney General or his designee, the court reporter, an interpreter if necessary, and the witness testifying. A state grand juror, the Attorney General or his designee, any interpreter used, the court reporter, and any person to whom disclosure is made pursuant to subsection (B)(2) of this section may not disclose the testimony of a witness examined before a state grand jury or other evidence received by it except when directed by a court for the purpose of:

(1) ascertaining whether it is consistent with the testimony given by the witness before the court in any subsequent criminal proceeding;

(2) determining whether the witness is guilty of perjury;

(3) assisting local, state, other state or federal law enforcement or investigating agencies, including another grand jury, in investigating crimes under their investigative jurisdiction;

(4) providing the defendant the materials to which he is entitled pursuant to Section 14-7-1700;

(5) complying with constitutional, statutory, or other legal requirements or to further justice.

If the court orders disclosure of matters occurring before a state grand jury, the disclosure must be made in that manner, at that time, and under those conditions as the court directs.

(B) In addition, disclosure of testimony of a witness examined before a state grand jury or other evidence received by it may be made without being directed by a court to:

(1) the Attorney General or his designee for use in the performance of their duties; and

(2) those governmental personnel, including personnel of the State or its political subdivisions, as are considered necessary by the Attorney General or his designee to assist in the performance of their duties to enforce the criminal laws of the State; provided that any person to whom matters are disclosed under this item (2) shall not utilize that state grand jury material for purposes other than assisting the Attorney General or his designee in the performance of their duties to enforce the criminal laws of the State. The Attorney General or his designee promptly shall provide the presiding judge before whom was impaneled the state grand jury whose material has been disclosed, the names of the persons to whom the disclosure has been made, and shall certify that he has advised these persons of their obligation of secrecy under this section.

(C) Nothing in this section affects the attorney-client relationship. A client has the right to communicate to his attorney any testimony given by the client to a state grand jury, any matters involving the client

discussed in the client's presence before a state grand jury, and evidence involving the client received by or proffered to a state grand jury in the client's presence.

(D) Any person violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be punished by a fine not exceeding five thousand dollars or by a term of imprisonment not exceeding one year, or both.

(E) State grand jurors, the Attorney General or his designee, the court reporter, any interpreter used, and the clerk of the state grand jury must be sworn to secrecy and also may be punished for criminal contempt for violations of this section.

S.C.C.A.35-1-304

SECTION 35-1-304. Securities registration by qualification.

(a) A security may be registered by qualification under this section.

(b) A registration statement under this section must contain the information or records specified in Section 35-1-305, a consent to service of process complying with Section 35-1-611, and, if required by rule adopted under this chapter, the following information or records:

(1) with respect to the issuer and any significant subsidiary, its name, address, and form of organization; the State or foreign jurisdiction and

date of its organization; the general character and location of its business; a description of its physical properties and equipment; and a statement of the general competitive conditions in the industry or business in which it is or will be engaged;

(2) with respect to each director and officer of the issuer, and other person having a similar status or performing similar functions, the person's name, address, and principal occupation for the previous five years; the amount of securities of the issuer held by the person as of the thirtieth day before the filing of the registration statement; the amount of the securities covered by the registration statement to which the person has indicated an intention to subscribe; and a description of any material interest of the person in any material transaction with the issuer or a significant subsidiary effected within the previous three years or proposed to be effected;

(3) with respect to persons covered by paragraph (2), the aggregate sum of the remuneration paid to those persons during the previous twelve months and estimated to be paid during the next twelve months, directly or indirectly, by the issuer, and all predecessors, parents, subsidiaries, and affiliates of the issuer;

(4) with respect to a person owning of record or owning beneficially, if known, ten percent or more of the outstanding shares of any class of equity security of the issuer, the information specified in paragraph (2) other than the person's occupation;

(5) with respect to a promoter, if the issuer was organized within the previous three years, the information or records specified in paragraph (2), any amount paid to the promoter within that period or intended to be paid to the promoter, and the consideration for the payment;

(6) with respect to a person on whose behalf any part of the offering is to be made in a nonissuer distribution, the person's name and address; the amount of securities of the issuer held by the person as of the date of the filing of the registration statement; a description of any material interest of the person in any material transaction with the issuer or any significant subsidiary effected within the previous three years or proposed to be effected; and a statement of the reasons for making the offering;

(7) the capitalization and long term debt, on both a current and pro forma basis, of the issuer and any significant subsidiary, including a description of each security outstanding or being registered or otherwise offered, and a statement of the amount and kind of consideration, whether in the form of cash, physical assets, services, patents, goodwill, or anything else of value, for which the issuer or any subsidiary has issued its securities within the previous two years or is obligated to issue its securities;

(8) the kind and amount of securities to be offered; the proposed offering price or the method by which it is to be computed; any variation at which a proportion of the offering is to be made to a person or class of persons other than the underwriters, with a

specification of the person or class; the basis on which the offering is to be made if otherwise than for cash; the estimated aggregate underwriting and selling discounts or commissions and finders' fees, including separately cash, securities, contracts, or anything else of value to accrue to the underwriters or finders in connection with the offering or, if the selling discounts or commissions are variable, the basis of determining them and their maximum and minimum amounts; the estimated amounts of other selling expenses, including legal, engineering, and accounting charges; the name and address of each underwriter and each recipient of a finder's fee; a copy of any underwriting or selling group agreement under which the distribution is to be made or the proposed form of any such agreement whose terms have not yet been determined; and a description of the plan of distribution of any securities that are to be offered otherwise than through an underwriter;

(9) the estimated monetary proceeds to be received by the issuer from the offering; the purposes for which the proceeds are to be used by the issuer; the estimated amount to be used for each purpose; the order or priority in which the proceeds will be used for the purposes stated; the amounts of any funds to be raised from other sources to achieve the purposes stated; the sources of the funds; and, if a part of the proceeds is to be used to acquire property, including goodwill, otherwise than in the ordinary course of business, the names and addresses of the vendors, the purchase price, the names of any persons that have received commissions in connection with the acquisition, and the amounts of the commissions and other expenses in connection with the acquisition,

including the cost of borrowing money to finance the acquisition;

(10) a description of any stock options or other security options outstanding, or to be created in connection with the offering, and the amount of those options held or to be held by each person required to be named in paragraph (2), (4), (5), (6), or (8) and by any person that holds or will hold ten percent or more in the aggregate of those options;

(11) the dates of, parties to, and general effect concisely stated of each managerial or other material contract made or to be made otherwise than in the ordinary course of business to be performed in whole or in part at or after the filing of the registration statement or that was made within the previous two years, and a copy of the contract;

(12) a description of any pending litigation, action, or proceeding to which the issuer is a party and that materially affects its business or assets, and any litigation, action, or proceeding known to be contemplated by governmental authorities;

(13) a copy of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature intended as of the effective date to be used in connection with the offering and any solicitation of interest used in compliance with Section 35-1-202(17)(B);

(14) a specimen or copy of the security being registered, unless the security is uncertificated; a copy of the issuer's articles of incorporation and

bylaws or their substantial equivalents, in effect; and a copy of any indenture or other instrument covering the security to be registered;

(15) a signed or conformed copy of an opinion of counsel concerning the legality of the security being registered, with an English translation if it is in a language other than English, which states whether the security when sold will be validly issued, fully paid, and nonassessable and, if a debt security, a binding obligation of the issuer;

(16) a signed or conformed copy of a consent of any accountant, engineer, appraiser, or other person whose profession gives authority for a statement made by the person, if the person is named as having prepared or certified a report or valuation, other than an official record, that is public, which is used in connection with the registration statement;

(17) a balance sheet of the issuer as of a date within four months before the filing of the registration statement; a statement of income and a statement of cash flows for each of the three fiscal years preceding the date of the balance sheet and for any period between the close of the immediately previous fiscal year and the date of the balance sheet, or for the period of the issuer's and any predecessor's existence if less than three years; and, if any part of the proceeds of the offering is to be applied to the purchase of a business, the financial statements that would be required if that business were the registrant; provided, however, that financial statements meeting the requirements of Regulation S-B shall be permitted to be substituted by issuers

that are "small business issuers" as defined by Regulation S-B (17 C.F.R. part 228); and

(18) any additional information or records required by rule adopted or order issued under this chapter.

(c) A registration statement under this section becomes effective thirty days, or any shorter period provided by rule adopted or order issued under this chapter, after the date the registration statement or the last amendment other than a price amendment is filed, if:

(1) a stop order is not in effect and a proceeding is not pending under Section 35-1-306;

(2) the Securities Commissioner has not issued an order under Section 35-1-306 delaying effectiveness; or

(3) the applicant or registrant has not requested that effectiveness be delayed.

(d) The Securities Commissioner may delay effectiveness once for not more than ninety days if the Securities Commissioner determines the registration statement is not complete in all material respects and promptly notifies the applicant or registrant of that determination. The Securities Commissioner also may delay effectiveness for a further period of not more than thirty days if the Securities Commissioner determines that the delay is necessary or appropriate.

(e) A rule adopted or order issued under this chapter may require as a condition of registration under this section that a prospectus containing a specified part of the information or record specified in subsection (b) be sent or given to each person to which an offer is made, before or concurrently, with the earliest of:

(1) the first offer made in a record to the person otherwise than by means of a public advertisement, by or for the account of the issuer or another person on whose behalf the offering is being made or by an underwriter or broker-dealer that is offering part of an unsold allotment or subscription taken by the person as a participant in the distribution;

(2) the confirmation of a sale made by or for the account of the person;

(3) payment pursuant to such a sale; or

(4) delivery of the security pursuant to such a sale.

S.C.C.A.35-1-305

SECTION 35-1-305. Securities registration filings.

(a) A registration statement may be filed by the issuer, a person on whose behalf the offering is to be made, or a broker-dealer registered under this chapter.

(b) A person filing a registration statement shall pay a filing fee set forth by the Securities Commissioner by rule or order. If a registration statement is withdrawn before the effective date or a preeffective

stop order is issued under Section 35-1-306, the Securities Commissioner shall retain a fee set forth by the Securities Commissioner by rule or order.

(c) A registration statement filed under Section 35-1-303 or 35-1-304 must specify:

(1) the amount of securities to be offered in this State;

(2) the States in which a registration statement or similar record in connection with the offering has been or is to be filed; and

(3) any adverse order, judgment, or decree issued in connection with the offering by a State securities regulator, the Securities and Exchange Commission, or a court.

(d) A record filed under this chapter or the predecessor chapter within five years preceding the filing of a registration statement or filed with the Securities and Exchange Commission and is available to the public without charge via the Internet may be incorporated by reference in the registration statement to the extent that the record is currently accurate.

(e) In the case of a nonissuer distribution, information or a record may not be required under subsection (a) or Section 35-1-304, unless it is known to the person filing the registration statement or to the person on whose behalf the distribution is to be made or unless it can be furnished by those persons without unreasonable effort or expense.

(f) A rule adopted or order issued under this chapter may require as a condition of registration that a security issued within the previous five years or to be issued to a promoter for a consideration substantially less than the public offering price or to a person for a consideration other than cash be deposited in escrow; and that the proceeds from the sale of the registered security in this State be impounded until the issuer receives a specified amount from the sale of the security either in this State or elsewhere. The conditions of any escrow or impoundment required under this subsection may be established by rule adopted or order issued under this chapter, but the Securities Commissioner may not reject a depository institution solely because of its location in another State.

(g) A rule adopted or order issued under this chapter may require as a condition of registration that a security registered under this chapter be sold only on a specified form of subscription or sale contract and that a signed or conformed copy of each contract be filed under this chapter or preserved for a period specified by the rule or order, which may not be longer than five years.

(h) Except while a stop order is in effect under Section 35-1-306, a registration statement is effective for one year after its effective date, or for any longer period designated in an order under this chapter during which the security is being offered or distributed in a nonexempted transaction by or for the account of the issuer or other person on whose behalf the offering is being made or by an underwriter or broker-dealer that is still offering

part of an unsold allotment or subscription taken as a participant in the distribution. For the purposes of a nonissuer transaction, all outstanding securities of the same class identified in the registration statement as a security registered under this chapter are considered to be registered while the registration statement is effective. If any securities of the same class are outstanding, a registration statement may not be withdrawn until one year after its effective date. A registration statement may be withdrawn only with the approval of the Securities Commissioner.

(i) While a registration statement is effective, a rule adopted or order issued under this chapter may require the person that filed the registration statement to file reports, not more often than quarterly, to keep the information or other record in the registration statement reasonably current, and to disclose the progress of the offering.

(j) A registration statement may be amended after its effective date. The posteffective amendment becomes effective when the Securities Commissioner so orders. If a posteffective amendment is made to increase the number of securities specified to be offered or sold, the person filing the amendment shall pay a registration fee set forth by the Securities Commissioner by rule or order. A posteffective amendment relates back to the date of the offering of the additional securities being registered if, within one year after the date of the sale, the amendment is filed and the additional registration fee is paid.

SECTION 35-1-306. Denial, suspension, and revocation of securities registration.

(a) The Securities Commissioner may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, a registration statement if the Securities Commissioner finds that the order is in the public interest and that:

(1) the registration statement as of its effective date or before the effective date in the case of an order denying effectiveness, an amendment under Section 35-1-305(g) as of its effective date, or a report under Section 35-1-305(i), is incomplete in a material respect or contains a statement that, in the light of the circumstances under which it was made, was false or misleading with respect to a material fact;

(2) this chapter or a rule adopted or order issued under this chapter or a condition imposed under this chapter has been wilfully violated, in connection with the offering, by the person filing the registration statement; by the issuer, a partner, officer, or director of the issuer or a person having a similar status or performing a similar function; a promoter of the issuer; or a person directly or indirectly controlling or controlled by the issuer; but only if the person filing the registration statement is directly or indirectly controlled by or acting for the issuer; or by an underwriter;

(3) the security registered or sought to be registered is the subject of a permanent or temporary injunction

of a court of competent jurisdiction or an administrative stop order or similar order issued under any federal, foreign, or state law other than this chapter applicable to the offering, but the Securities Commissioner may not institute a proceeding against an effective registration statement under this paragraph more than one year after the date of the order or injunction on which it is based, and the Securities Commissioner may not issue an order under this paragraph on the basis of an order or injunction issued under the securities act of another State unless the order or injunction was based on conduct that would constitute, as of the date of the order, a ground for a stop order under this section;

(4) the issuer's enterprise or method of business includes or would include activities that are unlawful where performed;

(5) with respect to a security sought to be registered under Section 35-1-303, there has been a failure to comply with the undertaking required by Section 35-1-303(b)(4);

(6) the applicant or registrant has not paid the filing fee, but the Securities Commissioner shall void the order if the deficiency is corrected; or

(7) the offering:

(A) will work or tend to work a fraud upon purchasers or would so operate; or

(B) has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or participations, or unreasonable amounts or kinds of options.

(b) To the extent practicable, the Securities Commissioner by rule adopted or order issued under this chapter shall publish standards that provide notice of conduct that violates subsection (a)(7).

(c) The Securities Commissioner may not institute a stop order proceeding against an effective registration statement on the basis of conduct or a transaction known to the Securities Commissioner when the registration statement became effective unless the proceeding is instituted within thirty days after the registration statement became effective.

(d) The Securities Commissioner may summarily revoke, deny, postpone, or suspend the effectiveness of a registration statement pending final determination of an administrative proceeding. Upon the issuance of the order, the Securities Commissioner shall promptly notify each person specified in subsection (e) that the order has been issued, the reasons for the revocation, denial, postponement, or suspension, and that within fifteen days after the receipt of a request in a record from the person the matter will be scheduled for a hearing. If a hearing is not requested and none is ordered by the Securities Commissioner, within thirty days after the date of service of the order, the order becomes final. If a hearing is requested or ordered, the Securities Commissioner, after notice of

and opportunity for hearing for each person subject to the order, may modify or vacate the order or extend the order until final determination.

(e) A stop order may not be issued under this section without:

(1) appropriate notice to the applicant or registrant, the issuer, and the person on whose behalf the securities are to be or have been offered;

(2) an opportunity for hearing; and

(3) findings of fact and conclusions of law in a record.

(f) The Securities Commissioner may modify or vacate a stop order issued under this section if the Securities Commissioner finds that the conditions that caused its issuance have changed or that it is necessary or appropriate in the public interest or for the protection of investors.

S.C.C A. 35-1-602(b)

SECTION 35-1-602. Investigations and subpoenas.

(a) The Securities Commissioner may:

(1) conduct public or private investigations within or outside of this State which the Securities Commissioner considers necessary or appropriate to determine whether a person has violated, is violating, or is about to violate this chapter or a rule adopted or order issued under this chapter, or to aid

in the enforcement of this chapter or in the adoption of rules and forms under this chapter;

(b) For the purpose of an investigation under this chapter, the Securities Commissioner or its designated officer may administer oaths and affirmations, subpoena witnesses, seek compulsion of attendance, take evidence, require the filing of statements, and require the production of any records that the Securities Commissioner considers relevant or material to the investigation.